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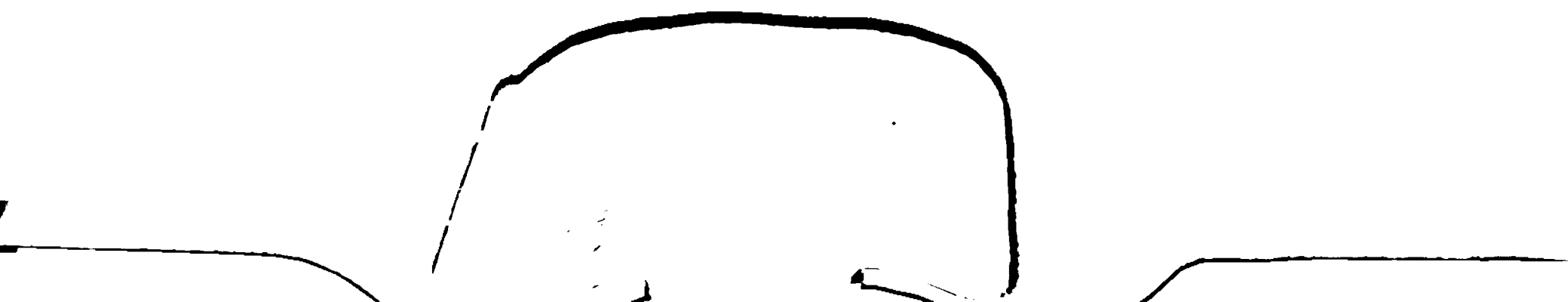
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From the author, DK

June 25, 1891.

✓ KENTUCKY JURISPRUDENCE

IN FOUR BOOKS:

I. CONSTITUTIONAL AND POLITICAL LAW. II. THE LAW OF
REAL ESTATE. III. OTHER RIGHTS OF PROPERTY.
IV. PERSONS AND THEIR OBLIGATIONS.

WITH AN INTRODUCTION ON THE SOURCES OF
KENTUCKY LAW.

BY

LEWIS N. DEMBITZ,

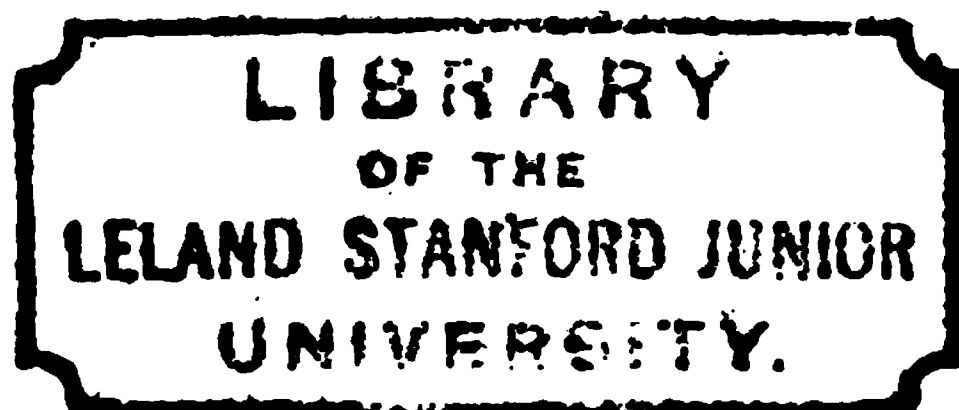
OF THE LOUISVILLE BAR.

LOUISVILLE:

PUBLISHED BY JOHN P. MORTON & COMPANY.

1890

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1890.

PREFACE.

While this preface is the last written part of this volume, the Prefatory Remarks (pp. 1-4), made Section 1 of the work, were written first. In drawing them up I had a threefold purpose: *First*, to make known to my publishers the character of the work to be written, and to enable them to judge of the expediency of undertaking the publication; *secondly*, to send it forth in a prospectus, so that my brother lawyers might judge whether it was worth their while to subscribe to the book; but *thirdly* and mainly, to lay out before myself a fixed plan to be followed out.

I found the execution of the plan much more difficult than I had anticipated. It was impossible not to state a great many well-known principles of law, recognized in every State of the Union, as a preliminary to a statement of the divergences wrought out in Kentucky by either statute or decision. On the other hand, I could not take up some of the larger subjects, such as trusts, or the construction of grants and devises, although here and there a Kentucky decision might deviate from the general run of American law, but had to confine myself to certain "lines" or "classes of cases," which seemed more than others to deserve a local treatment. It was also difficult where to draw the line to the exclusion of criminal law, of political institutions, and of the details of practice. I thought it best, however, to give the benefit of the doubt to the reader, where it could be done by the addition of a few lines; and I have even added some authorities

in the "Supplement," which did not strike me as pertinent to my work while I was treating the particular subject.

The number of the Kentucky Law Reporter published July 15, 1890, is the latest publication that has been used in the preparation of the book.

This is my first venture in the role of a law-book writer, and as it is upon a heretofore wholly untrodden field, I crave the indulgence of my brethren of the profession for any shortcomings they may find in this volume. I hope it may be followed by "Jurisprudence" of the other American States.

LEWIS N. DEMBITZ.

LOUISVILLE, KY., August 28, 1890.

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NOTICE.

The reader is requested to read with each section of the work, any addition thereto, which may be found in the "Supplement," pages 673-684.

PREFATORY REMARKS.

SECTION 1. PLAN OF THE WORK. The laws of forty-one out of the forty-two States of the American Union, being derived from the law of England, bear a close family resemblance to one another. All of them started from the "Common Law and Acts of Parliament made in amendment thereof," at the time when the colonies were founded. In the case of Virginia and of the States deriving their jurisprudence from her, the English statutes down to 1607 only were recognized as parts of the law, while the settlers of New England, New York, and other colonies brought the English law over with them as it stood at a later date, those of Georgia bringing it to their new homes in a comparatively modern form. But most of the statutes affecting private rights that were passed in England after 1607, and before the days of American independence, were substantially re-enacted in those colonies which did not recognize them as in force by virtue of their enactment in the mother country; and from the thirteen colonies these statutory laws of English origin were transmitted, not only to the thirteen original States, but to all the others except Louisiana. We need but recall the following statutes, well known to every student of the law: That of Limitations, that of Distribution, that of Frauds and Perjuries, the Habeas Corpus Act, the Act of 8 and 9 William and Mary, allowing courts of law to relieve against penalties, the Statute of Anne as to promissory notes, the Acts of 8 Anne and of 11 George II for the benefit of landlords, the statutes for the suppression of gaming and for the avoidance of wager policies. All of these are found substantially re-enacted in *almost* every American State. The same can be said of many much more recent reforms in the

law, some of which took their first rise on one, some on the other side of the Atlantic. Such are the "Factor's Act" for validating pledges of consigned goods, the acts which allow choses in action and equitable interests to be reached by proceedings in aid of execution, "Lord Tenderden's Act" requiring a representation of another man's credit to be in writing, the acts enlarging the property rights of married women, the laws allowing interested parties to testify, not to speak of the more or less sweeping changes in the law of procedure.

Moreover, the decisions of the English and Federal courts on the common and mercantile law and the principles of equity, together with the judgments rendered by courts of last resort of every State, are read as authorities, or at least as instructive precedents in every State, and help to keep the details of private law in the whole length and breadth of the Union in substantial harmony, and in many departments even Louisiana shares in the giving and receiving of precedents.

But while in its general outlines and in many of its special features the jurisprudence of each State bears this family likeness to that of every other, yet striking divergencies have been developed between the laws of the several States. These are due to two causes, differences in legislation and different courses of judicial decision.

The differences in legislation go back to the very beginning of colonial life, when, for instance, Virginia had courts of equity, but Pennsylvania and Rhode Island had none; or when New York and Massachusetts, as commercial colonies, adopted the "Statute of Anne," the planting State of Virginia did so only partially, and her daughter, Kentucky, followed her example. In modern times Kentucky has forbidden all preferences among the creditors of an insolvent; New York allows such preferences. In New York and Illinois the disabilities of married women are almost wholly removed; in Kentucky most of these disabilities still exist.

But there are many subjects still untouched by statute; there are others on which the statutes of the several States agree almost literally, yet the courts have in different States come to different conclusions. Thus, the courts of New York

have laid down the rule for several sub-purchasers of incumbered property, that the purchaser of the last parcel must first bear the burden, and the other sub-purchasers in inverse order,¹ while the Kentucky rule makes them all contribute ratably without reference to the order of their purchases.² In nearly every other State the giving of a check on a bank of deposit is treated as not being an equitable assignment of the fund; in Kentucky it is.³ Such divergencies may often be due to some local feeling or supposed public policy, but they flow much oftener by some accident from the preconceptions of the judge on whom it first falls to decide a doubtful point, or from the greater skill or industry of the counsel who gains the first decision.

But the precedent having once been set, it is neither easy nor very desirable to break it; it is best for each State, through its courts, to remain true to its own line of decision on any matter of detail, unless indeed the course is so beset with mischief or inconvenience as to make it worth while for the legislature to interfere.

For instance, when the Court of Appeals of Kentucky decided, in 1870, that railroad shares are "land," and subject to the widow's dower,⁴ the inconvenience was felt to be so great that at its very next session the General Assembly passed a law making such shares *thenceforth* personal property for all purposes whatsoever.⁵ But it was not thought worth while to change the law of bank checks, as declared by the Court of Appeals, only to bring it into harmony with the jurisprudence of other States.

It will be the purpose of this book to set forth those rules, sometimes forming a whole independent branch of the law, which, *in the State of Kentucky*, either through statute or judicial decision, have taken a different form as compared with rules followed in all or in many of the other States.

Criminal law will be excluded from our consideration;

¹ Clowes v. Dickenson, 5 J.C.R. 235.

² Dickey v. Thompson, 8 B. M. 312.

³ Lester & Co. v. Given, Jones & Co.,

8 Bush, 360.

⁴ Copeland v. Copeland, 7 Bush, 850, following Price v. Price's heirs, 6 Dana, 107.

⁵ Act of March 22, 1871.

also much of the political code, or of the statutes on schools, elections, revenue, militia; though questions arising out of these statutes, but touching private rights, must be discussed. The law of proceedings in the courts lies also, for the most part, outside of our range; yet we must consider the rights that grow out of such proceedings, such as the liens and titles arising under attachment or execution. The constitutional law of the State will be treated more fully than most other branches, as it is most difficult here to trace the line between what is the general law of all the States and the peculiar law of Kentucky.

To the Kentucky practitioner this volume is to serve as a corrective of the doctrines which he will meet in the ordinary text-books on any given branch of the law, and still more will such a book be needed by the lawyer in other States who is interested in title to lands in Kentucky, in claims against its residents, or in any questions, whether litigated in its courts or elsewhere, that depend upon the law of this State for their correct solution.

Should this volume find a favorable reception, it will undoubtedly be the forerunner of similar works on the special jurisprudence of many other States, and will, together with them, form a valuable part of the American lawyer's library, a rich mine for the study of comparative American jurisprudence.

KENTUCKY JURISPRUDENCE.

INTRODUCTORY.

CHAPTER I.

SOURCES OF KENTUCKY LAW.

SEC. 2. England and Virginia.

SEC. 3. The Constitution.

SEC. 4. Statute Revisions.

SEC. 5. Later Revisions, etc.

SEC. 6. The Compact with Virginia.

SEC. 7. Reports.

SECTION 2. ENGLAND AND VIRGINIA. Kentucky having, until the 1st day of June, 1792, been a part of Virginia and subject to her laws, became on that day a separate State.

In May, 1776, the Colony of Virginia took upon herself the rights and powers of a commonwealth, mainly by means of an "ordinance" passed in that month by the legislature of the colony, section six whereof reads as follows:

"And be it further enacted, That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the general ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force until the same shall be altered by the legislative power of this colony."

It has lately been urged that the common law as it stood in 1607, not as it was changed by the course of subsequent decisions, was adopted by Virginia and Kentucky.¹ This view is hardly practicable, by reason of the scarcity of reported cases that were adjudged before 1607, and yet are applicable to America and to modern times; but it was solemnly asserted by the Court of Appeals in 1878, in passing on the doctrine of ancient lights."²

The first Constitution of Kentucky, which went into effect on the first of June, 1792, declares in Article VIII, Section 6:

"All laws now in force in the State of Virginia, not inconsistent with this Constitution, which are of general nature and not local to the eastern part of that State, shall be in force in this State, until they shall be altered or repealed by the legislature."

In the second Constitution, adopted in 1799, this clause was re-enacted (Article VI, Section 8), putting the date, "June 1st, 1792," in place of the word "now," found in the first Constitution. In 1806, on an appeal from a decree in chancery, obtained by aliens for the recovery of

¹The appeal of *Cornelison v. The Commonwealth* from a sentence of three years' imprisonment, rendered *at common law* as a punishment for assault and battery, came before the Superior Court (a temporary and intermediate Court of Errors), made up of special judges for the hearing of this appeal. The judgment was reversed, among other grounds, on this, that the common law, as understood in England in and before 1607, punished assault and battery by fine only. On a further appeal to the Court of Appeals (84 Ky. 583—September Term, 1886) the majority of the court reinstated the sentence of Circuit Court, but avoided the question as to the stage of the common law that was transplanted to Vir-

ginia, by holding that all indictable misdemeanors were always punishable at common law by fine or imprisonment, or both, in the discretion of the court.

²*Ray v. Sweeney*, 14 Bush, 1, 11, with this modification: "But so far as the English rule is based upon sound principles and natural justice it may be in force here, not, indeed, because it is in force in England, but because, being based on sound reason, it is law everywhere." But English cases decided after 1607 are admissible to show what the common law was before 1607. And they are freely quoted in the construction of those later English statutes which have been re-enacted in Virginia and Kentucky.

land in Kentucky, the Court of Appeals refers to the Virginia ordinance quoted above, and to the clause in the Constitution of 1799, adopting the laws of Virginia, and proceeds :

“It must, therefore, be manifest that the common law of England respecting aliens is in force in this commonwealth, inasmuch as no law of Virginia or of this State has changed, repealed, or altered this principle of the common law.”³ Many of the land laws of Virginia concerning the first disposition of the soil were expressly re-enacted in 1796.⁴ In 1808, under stress of the then prevailing hatred of Great Britain, the Kentucky Legislature enacted a law :

“That all reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the 4th day of July, 1776, shall not be read nor considered as authority in any of the courts of this commonwealth, any usage or custom to the contrary notwithstanding.”

Twice during the year in which the act was passed, once at its spring⁵ and once at its fall term,⁶ the Court of Appeals took occasion to stop counsel from reading post-revolutionary English reports, 3 East in one case, Douglas in the other. Mr. Clay, in the former case, was not even allowed to read from an opinion in the modern book a resume of decisions to be found in older books that were clearly good authority. Said Judge Trimble from the bench : “The legislature seems to have intended entirely to prohibit the use of these books in court, and thus cut off the importation of them.”

The statute was never repealed until 1852, when it was omitted from the revision made in that year, but it failed entirely of its object of cutting off the importation of English reports. It was obeyed by the Court of Appeals for a few years, but as early as 1821 that court disregarded the statute, and it was soon afterward thrown aside with the full

³ *Hunt v. Warnicke's heirs*, Hardin, 62. Of course later statutes, to be noticed hereafter, have greatly modified the disabilities of aliens.

⁴ See Litt. Laws of Ky., vol. 1, pp. 385-464.

⁵ *Hickman v. Boffman*, Hardin, 864.

⁶ *Gallatin v. Bradford*, 1 Bibb, 209.

acquiescence of the bar,⁷ and soon afterward fell into complete disuse.

While the restriction was obeyed it must have worked some inconvenience, as there were then but few American reports, especially on equity jurisprudence, and the older English reports were somewhat out of date; but it is not probable that the temporary exclusion of the judgments of Lords Kenyon, Ellenborough, and Tenterden, or of the decrees of Thurlow and Eldon, from the ear of Kentucky courts had any permanent effect on the jurisprudence of Kentucky. If the words of these sages of the law could not be read directly in the hearing of the judges, they would come to them indirectly through the pages of Kent and Story, or through the opinions of the Federal judges, and through the reports of New York and New Jersey, Virginia, North and South Carolina, Pennsylvania, and Massachusetts; for none of these States had sought to exclude, by statute, light that could be shed from any source on the common law or on the statutes common to both branches of the English race.⁸

SEC. 3. THE CONSTITUTION. The Court of Appeals of Kentucky undertook at a very early date, that is, in 1801, to declare three distinct acts of the General Assembly to be void, as being contrary to the guarantee of the right of trial by

⁷In 1821, 3 A. K. Mar. 265, a *late* edition of Chitty on Bills is quoted as containing cases in point to that before the court (giving each successive party liable on a bill one day in which to notify the next that the bill is dishonored), and the rule of the cases is followed. Chitty's Pleadings, Espinasse's *Nisi Prius*, and Starkie on Evidence are often quoted by the court, though mainly based on modern English decisions. In *Reed & Glenn v. Bullock*, Litt. Sel. Cas. 512 (also 1821) all pretense is thrown aside, and the court quotes at length from an opinion of Lord Redesdale, though without giving volume or page. It took a few years more be-

fore recent English cases were quoted by name and reference to book and page. See opinion and petitions for rehearing in *Kennet v. Robinson*, 2 J. J. Mar. 84. And whatever restraint was at one time felt by counsel at the bar, the statute was always disregarded by Mr. Bibb as reporter in his critical notes (f. i. 3 Bibb, 239), and was ridiculed outright by Mr. Littell in the preface to his reports.

⁸It should be noted that after the first three volumes of Kentucky Reports, which run from 1792 to 1808, references to Virginia decisions become very rare, much rarer than to those of New York.

jury contained in the Constitutions of 1792 and 1799;¹ and this at a time when the courts of some States still doubted their power to disregard a statute on such grounds. And though always professing to approach the question of the validity of a law with great reluctance, the Court of Appeals has generally acted pretty boldly upon conflicts between the organic and the statute law, sometimes in the face of strong popular feeling.²

The present Constitution of Kentucky was adopted in 1850, and will probably soon give room to an instrument more in consonance with the modern pattern. It enters but sparingly into the domain of private right, not much more than the two older Constitutions, those of 1792 and 1799. Its last article is a Bill of Rights of thirty sections, some of which are more or less obsolete (*e. g.*, Sec. 23, which does away with deodand, and with the forfeiture of the estates of suicides), while the more important sections impose on the law-making power of the State pretty much the same restrictions that the Federal Constitution, as amended, imposes on the powers of Congress.

The first section, however, is unusual in its wording, and of rather wide scope:

“That all freemen,³ when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public service.”

The next section asserts that “arbitrary power does not exist anywhere in a free government,” . . . “not even in the greatest majority.” This section gives to the courts color for invalidating a statute as running counter to the general spirit of the Constitution, though not in conflict with any one clause in particular.⁴

The third section, which sets the right of property, including property in slaves, above and before all constitutional

¹ Printed Decisions, p. 52, *ib.* 58, *ib.* 76.

April 19, 1792) says “men” in place of “freemen.”

² *Vide infra*, Sec. 7.

⁴ See particularly Chapter V, on the

³ The first Constitution (adopted

bearing of the Constitution on taxes.

sanctions, together with other parts of the Constitution intended to fortify slavery and to drive free negroes from the State, has had its day.

Other restrictions refer to the mode of enacting laws and to the form of acts: "No act shall relate to more than one subject, and that must be expressed in the title."⁵ No special acts can be passed to grant divorces, to change names, or to sell the estates of persons under disability, all of which must be done by the courts under general laws; but no other limits are set to special legislation. The credit of the State is in no case to be lent to any person, municipality, or corporation;⁶ but this does not hinder the legislature from authorizing or even directing counties, cities, or towns to incur debts or lend their credit.⁷

The officers of cities and towns must be "elected" for not more than four years, in such manner as the General Assembly shall prescribe. By whom they must be elected is left open; at any rate, though, either by the voters of the city or town, or by some plural body deriving its own powers from their election.⁸

The Constitution required the first General Assembly which was to meet after its adoption to appoint commissioners for revising the statute law and for simplifying practice in the courts.

In separate chapters on the Constitution we shall treat of the points in which, either by reason of the special wording of the organic law, or through the special view of Kentucky judges, its limitations have taken a peculiar shape, though it will be impossible not to state in this connection much Kentucky law which is in full agreement with the conclusions reached in other States; and, in fact, it will be best to give to our readers a pretty full abstract of the Kentucky Decisions on Constitutional Law.

SEC. 4. STATUTE REVISIONS. There were *compilations* of statutes before 1850. The first of any note, "Littell's Laws of Kentucky," was published in 1809. It gives all acts of

⁵ Const., Art. II, Sec. 87.

⁶*Ib.* Secs. 85, 86.

⁷ See *infra*, under "Local Assent."

⁸ Art. VI, Sec. 6; see *infra* section.

the General Assembly from 1792 to 1809 not repealed or obsolete, and the titles of these, in order of time, as well as private acts, in a greatly abridged form. At the end of the second of the three volumes the English and Virginia acts still in force in Kentucky are set out. Both the English and the Virginia statutes here found are few and unimportant, as the Kentucky Legislature had, as early as 1796 and 1798, undertaken to re-enact most of the important statutes of the elder colony and mother country adapted to the needs of the new State.

The compilation of Morehead and Brown, made in 1837, is still consulted often with regard to land titles. It contains only general laws, not such as refer only to some county, city, or town. It was published in two volumes, and the subjects are arranged in alphabetic order. English and Virginia statutes, as far as still in force, are placed under the proper headings. Often separate sections of the same act are found under different headings, and repealed or obsolete sections are omitted. Full notes of the decisions of the Court of Appeals are subjoined. An additional volume intended as a supplement to this work, and arranged in like manner, brings the statute law down to 1842. This was prepared by Preston S. Loughborough, and published in that year.

The Constitution of 1850 provides in Article VIII, Section 22:

“At its first session after the adoption of this Constitution the General Assembly shall appoint not more than three persons, learned in the law, whose duty it shall be to revise and arrange the statute laws of this commonwealth, both civil and criminal, so as to have but one law on any one subject; and also three other persons, learned in the law, whose duty it shall be to prepare a Code of Practice for the courts, both civil and criminal, in this commonwealth, by abridging and simplifying the rules of practice and laws in relation thereto; all of whom shall, at as early a day as practicable, report the result of their labors to the General Assembly for their adoption or modification.”

Under the first clause of this section C. A. Wickliffe, Squire

Turner, and S. S. Nicholas were appointed, and made their report of the "Revised Statutes" in December, 1851. Their draft was discussed and amended in some of its details, and "an act to adopt the Revised Statutes," which embraces this revision, was enacted, to go into effect on the first day of July, 1852.

The second section of the act directs:

"That all statutes of a general nature, whether of this State, of Virginia, or of England, adopted prior to the first of November, 1851, other than the Revised Statutes adopted at the last session of the General Assembly, shall stand repealed when the Revised Statutes take effect, except as follows:

"1. All statutes of Virginia or this State in relation to former appropriation of the vacant lands of this commonwealth.

"(Clauses 2 and 3 exempt all laws of a local nature from repeal.)

"4. The Code of Practice in civil cases adopted at the last session of the General Assembly, so far as the same is consistent with the Revised Statutes. The provisions of such code inconsistent with the Revised Statutes are repealed.

"5. The statutes regulating proceedings in civil, criminal, and penal cases not repealed by the Code of Practice or the Revised Statutes."

Thus the revision left much ground open, and room for dispute and doubt. The chief blemish of Kentucky statute law, the existence of many acts on general subjects in force in only one or more cities or counties, was not removed, and it has since been rather increased than diminished. The division of work between the two commissions was unfortunate, as it is difficult to draw the line between laws regulating practice and other laws. In fact, the Revised Statutes regulated many subjects belonging or closely akin to practice in the courts, such as executions, attachments for rent, proceedings for the sale of infants' lands, appointment of administrators, probate of wills. The revisers, moreover, went far beyond the task mapped out for them in the Constitution; they introduced into the law some strikingly new features, such as a sec-

tion which forbids married women from selling or encumbering their "separate estates" with or without the consent of the husband.¹ But the great defect of the revision lies in the alphabetic arrangement of the chapters, that is, in the avowed absence of all system.

Three other eminent lawyers, James Harlan, Preston S. Loughborough, and Madison C. Johnson, were set to work on the Codes of Practice. As early as the winter of 1851 they made a partial report, which went into effect on the 1st of August of that year. It referred to civil cases only, and excluded of these even large classes which remained subject to the old rules. The work was, however, resumed, and in 1854 a much enlarged "Code of Practice in Civil Cases" and a "Code of Practice in Criminal Cases" went into effect, based in their main outlines on the New York Codes of Procedure, and highly systematic both in definitions and in arrangement.

The Civil Code (as it is commonly called) does not abolish the distinction between "law" and "equity," but requires those actions which were previously recognizable at law to be brought and conducted by "ordinary proceedings;" those which were cognizable in equity by "equitable proceedings," with an option to the suitor in cases where the remedy was concurrent under the old law. But a mistake in the kind of proceedings would not involve a dismissal; it would be righted by a transfer of the cause from the improper to the proper docket, or in Jefferson County, which had a separate equity judge, by a transfer from court to court.

The Code of 1854 did not cover the whole ground. Its repealing clause (Section 875) abrogates "all statutes and laws heretofore in force in this State in any case *provided for* by this Code or inconsistent with its provisions." This clause, however, was very narrowly construed, and many points in the law of procedure were still governed by the Revised Statutes or by older laws.² Only a part of this

¹ Rev. Stat., Ch. 47, Art. IV, Sec. 17, greatly modified in the General Statutes of 1873.

² In *Lusk v. Anderson's adm'r*, 1

Metc. 426, the next of kin of a decedent were allowed to defend a suit brought at law against the administrator, upon his refusal to defend,

evil has been removed by the later revisions, which have taken the place of the Revised Statutes and of the Codes of 1854.

SEC. 5. LATER REVISIONS, ETC. The legislature, after enacting the Revised Statutes of 1852 and the Codes of 1854, enacted its permanent laws generally in the form of amendments to these revisions. The amendments to the Codes were sparing, those to the Revised Statutes many and pretty sweeping, especially in the political chapters, such as schools, militia, revenue.

In 1859 Richard H. Stanton compiled an edition of the Revised Statutes with the subsequent amendments and with notes of decisions. It was published in 1860 in two heavy volumes; and the need for it was so much felt that the legislature aided the publication greatly by purchasing copies for the courts and magistrates. Again, in 1866, Harvey Myers compiled a Supplement of the statutes of general interest adopted after those found in Stanton's edition of the Revised Statutes, which also received State aid. But the changes became so frequent that it was thought best to get up new revisions, which were to be enacted as a whole by legislative authority. As a basis was already at hand, both for the ordinary statutes and for Codes of Procedure, it was thought sufficient to have two instead of three commissioners to revise the "Statutes," and one only (Joshua F. Bullitt, formerly a Judge of the Court of Appeals) for the "Codes."

The "General Statutes" were made a schedule to an act of April 22, 1873, which puts them in force as of the first of December, 1873. The second section reads as follows:

"That all statutes of a general nature in force when

under a statute of 1846. It was also the custom of the Circuit Courts, with the approval of the Court of Appeals in several unreported cases, to treat an act of 1838 as still in force after 1854, which act allows creditors, before judgment, even before maturity of their demands, to assail the prop-

erty of the debtor in equity, on the allegation of a fraudulent conveyance, made or threatened, and in such suit to proceed with or without an attachment, though the Code of 1854 provided a remedy in such cases, but by order of attachment only.

the General Statutes take effect, and which are repugnant thereto, are hereby repealed, except as follows, viz:

“1. (Same as in Revised Statutes, *vide supra*.)

“2. All statutes of a merely local relation to any county, city, or town, or relating to the powers, privileges, or franchises of any corporation; all statutes in relation to . . . (two named charities), Banks, the Internal Improvement System, Insurance, and the Insurance Bureau.

“3. All statutes in relation to (local courts).

“4. The provisions of the Codes of Practice in civil and criminal cases, so far as the same are inconsistent with the General Statutes.”

How far former statutes have been abrogated by this revision has been repeatedly discussed before the highest court. In the leading case on the subject,¹ arising very soon after the enactment of the General Statutes, the Court of Appeals held that, aside from this repealing section, the revision, as such, had the effect of abrogating all statutes coming within its purview; for to let this revision be construed together with former laws would create confusion, and defeat the legislative intent, that all general laws should be found in condensed form. “The General Statutes must be regarded as containing a complete system of laws, and in so far as they treat of any general law, whether under the title of ‘Wills,’ ‘Executors and Administrators,’ ‘Husband and Wife,’ ‘Guardian and Ward,’ etc., it must be considered and treated as all the statute law on the subject indicated by the title.”

In two subsequent cases it was held that an act of 1869, regulating the effect of warehouse receipts,² and declaring the duplication of such a receipt a felony, remained in force “because this was a general law, not repugnant to any thing in the General Statutes, no provision having

¹ *Broadus’ devisees v. Broadus’ heirs*, 10 Bush, 299, 307; *Summer Term*, 1874.

² *Commonwealth v. Mason*, 82 Ky., 256 (1884), following *Cochran & Ful-*

ton v. Ripy, Hardie & Co., 13 Bush. Art. II, Sec. 6, of act adopting General Statutes, B. & F. ed., p. 160; see *Sellers v. The Commonwealth*, 18 Bush, 331.

been made therein as to warehousemen, their duties or liabilities."

The acts of the session at which the General Statutes were passed are not repealed, but take effect as amendments.

In 1876 the General Assembly, upon the report of Joshua F. Bullitt (a former Appellate Judge), a single commissioner appointed for that purpose, adopted new Codes of Practice, both in civil and in criminal cases, which went into operation on the first of June, 1877. An effort is made in the new Civil Code to cover more nearly the whole ground of civil proceedings. It purports to regulate all suits by which the land of persons under disabilities can be sold, either for debt, division, for the needs of the owner, or for reinvestment. It adopts the law contained in the General Statutes as to attachment for rents.³ Its repealing section is more sweeping than that of the former code. As to "civil cases commenced hereafter," "laws within the *purview* of those provisions (*i. e.* of this code) are repealed; and this repeal does not revive any law which may have been repealed by laws which are hereby repealed."⁴ "The Code of Practice in Criminal Cases," which also went into effect on the first of January, 1877, also repeals "all laws coming within the *purview* of this act."⁵ Under this section it was held that the provisions of the General Statutes, under which any judge or justice may order the seizure of a gambler's implements, and his being held to bail not only for his appearance, but also to secure his good behavior for one year, stands unrepealed, though the Code provides for the arrest of all criminals (including gamblers), and for holding them to bail to appear for trial.⁶

There are also new editions of the Codes, among them John D. Carroll's, of 1888, with amendments, notes, and forms. But here the changed or repealed sections are allowed to stand.

The peculiar feature of the present "Civil Code" is that it requires in all cases, both in ordinary and in equitable proceedings, *a pleading to issue*; and, as "the facts" must be

³ Civ. C. P., Sec. 195.

⁴ *Ibid.*, Sec. 838.

⁵ Cr. C. P., Sec. 3.

⁶ *Com'w'th v. Watts*, 84 Ky. 537.

pleaded in all cases, the requirement is often very hard to comply with, especially in complicated chancery cases. The pleadings sometimes spin out to a surrejoinder in modern Kentucky practice; a pleading is the last only when it is made up of nothing but denials.

NOTE.—The Revised and General Statutes (Ch. 21, Sec. 15) lay down the rule that all enactments, criminal, civil, or penal, shall be construed alike, with a view to carry out the law-giver's intent. Still the reported opinions of the highest court often show an avowed discrimination against laws which impose taxes, especially local taxes and so-called assessments, which denounce a civil forfeiture or which confer any exclusive privilege.

SEC. 6. THE COMPACT WITH VIRGINIA. An act of the Virginia Assembly, passed on the 18th of December, 1789, by which its assent is given to the erection of the "District of Kentucky" into a separate State, upon certain conditions therein enumerated, is known in Kentucky jurisprudence as the "Compact with Virginia," and has been of great importance in its bearing upon land titles in the new State. The third and fourth conditions contained in Sections 7 and 8 require:

"That all private rights and interests in lands derived from the laws of Virginia before the separation shall remain valid and secure, and be determined by then existing laws; that the lands of non-resident owners residing in Virginia or in other States making the stipulation reciprocal shall not be taxed higher than that of resident owners, and for six years after the admission of Kentucky into the Union the land of non-residents shall not be forfeited for failure to cultivate or improve the same." The ninth and tenth conditions, extending the time for locating Virginia land warrants in Kentucky to dates therein named, became in one sense needless by the delay in forming the new State.¹ The limitation of Virginia entries to May 1, 1792, became, however, a landmark in Kentucky land law. The Supreme Court of the United States²

¹The Compact with Virginia is found in every edition of the Revised or of the General Statutes, also in Littell's Laws of Kentucky, Vol. I,

also in Morehead and Brown's Statutes, Vol. I.

²Green v. Biddle, 8 Wheat, 1 (1828), Johnson, J., dissenting.

has construed the condition here enacted by Virginia, together with its acceptance by the Kentucky convention which formed its first Constitution, and which is expressed in that instrument as a contract; and this contract was ratified by Congress in the act admitting the new State, as such admission and the resulting division of Virginia could only be made with her assent and upon her own terms. In the same case the Supreme Court (differing from the Kentucky Court of Appeals)³ held that the "occupying claimant" laws of Virginia, passed in 1797 and 1812, which greatly abridged the successful claimant's right to mesne profits, and compelled him to pay the evicted occupant for improvements, were void, as far as they affected grantees under the Virginia laws of Kentucky lands, as impairing the force of their grants and the obligation of the compact between the two States.

The effect of the compact on land titles derived from Virginia will be discussed in a section on "Virginia claims."

The present Constitution of Kentucky embodies the compact as part of itself, subject to such modifications as may be made therein according to its own provisions; that is, by the consent of both States.⁴

SEC. 7. OFFICIAL AND OTHER REPORTS. The first volume of Kentucky Reports is known as "Hughes'." It begins with the decisions rendered by the Supreme Court of Virginia for the District of Kentucky between 1785 and 1792, and gives those of the Court of Appeals of Kentucky from 1793 to 1802; but all of the cases given refer to "pre-emptions" and "settlements" of land, and arise either upon *caveat* against the issuance of a land patent, or upon a bill in equity to protect the inchoate title. The next volume is known as "Printed Decisions," sometimes as Sneed's Reports. It covers all the decisions of the Court of Appeals from 1802 to 1807, and is nothing but a copy from the order-book of the court: as at first published, without table of cases, syllabus, or index: the cases being often in the style of clerk's entries rather than that of reasoned opinions. With the one volume of Hardin (Spring Term, 1805, to Spring Term, 1808,) begins a

³ Fowler v. Halbert, 4 Bibb, 52.

⁴ Bibb 52, and other cases. Art. VIII, Sec. 9.

series of regular reports, averaging about one a year. There are four volumes of Bibb, three of A. K. Marshall, five of Littell, beside one volume of Littell's Select Cases, which range from 1795 to 1821, being the author's own selection of cases which the court had not ordered to be reported. Then follow seven volumes of Monroe (*i. e.* T. B. Monroe), seven volumes of J. J. Marshall, nine of Dana, eighteen of Ben. Monroe, four of Metcalfe, two of Duvall, fourteen of Bush. The next volume of reports bears no longer the name of the reporter, but is called simply 78th Kentucky, and the series thence proceeds by current numbers. The "87th Kentucky," closing with a decision of December 8, 1888, was published in December, 1889.

At the Fall Term of 1823 the Court of Appeals, then composed of Chief Justice John Boyle, Judge William Owsley, and Judge Benjamin Mills, decided in two cases¹ that the stay law passed by the General Assembly in 1819, and which extended the time for replevy and sale bonds from three months to two years, unless the judgment creditor should be willing to accept "Commonwealth paper" in satisfaction, was unconstitutional, being a "law impairing the obligation of contracts" within the meaning of the Federal Constitution. Thereupon the "Relief party" carried an act through the legislature² abolishing the Court of Appeals as established by the Constitution of 1799, and conferring all of its appellate jurisdiction upon a new Supreme Court to be composed of four judges, and to be known as the Court of Appeals. The judges of the "old court" never recognized the "new court" as any thing more than a lawless usurpation. Nevertheless, the four judges (all of them "Relief men") took their seats on the bench at the Spring Term, 1825, and held them also during the Fall Term of that year. Their opinions fill the second volume of Monroe's Reports, which is for that reason considered as of hardly any authority, the bench pronouncing the opinions being really no court at all. Soon, however, the people came to their sober senses, and the next legislature re-

¹ *Lapsley v. Brashears*, 4 Litt. 47;
Blair v. Williams, *ib.* 84.

² Approved December 24, 1824,
prefixed to 2 Monroe.

pealed the act establishing the new court, and the next volume of Monroe (the third) again reports the judgments of the "old court."

The twenty-eight volumes of Littell, Monroe, J. J. Marshall, and Dana cover only eighteen years. A statute then required that every case in which the defeated party should file a petition for rehearing must be "reported," the petition though overruled going into the volume of reports. Some very long and very able "petitions" by lawyers of the highest ability are found in these volumes, swelling their bulk considerably. Some caution is needed in reading these reports lest the convincing language of these petitions be mistaken for the law of the case as coming from the court.

The decisions contained in these twenty-eight volumes (excepting 2 Monroe), and in a hardly lesser degree in the eighteen volumes of Ben. Monroe, occupy a very high rank in American law literature, and offer a strong argument for the excellence of an appointive judiciary. But aside from the independence and learning of the judges, there were two other reasons for the good work done by them and shown in these reports. First, the number of cases that came before them was small as compared with our times, not only because the population was smaller and poorer, but also because no appeal lay in those days in felony cases, to which the appellate jurisdiction of the court was first extended by the Criminal Code of Practice in 1854. Secondly, in the absence of railroad communication the work of arguing cases before the Court of Appeals fell almost exclusively to a few counselors of the first rank, such men as Henry Clay, Ben. Hardin, or ex-Judges Mills and Bibb. Thus the bench had the greatest possible assistance from the bar. So much for the regular reports.

Ever since 1808 it seems to have been the rule and custom of the court to give only such opinions out for publication in the printed reports as they thought to be of public interest. Sometimes, also, they withheld opinions from publication on the ground of feeling some doubt as to the correctness of the result arrived at. Those opinions, however, were preserved in the clerk's office of the Court of Appeals, and were often

sought out as authorities by counsel happening to know of their existence. They then come to be quoted in later reported opinions, and are thus clothed with new authority. Many of these manuscript opinions have also come into publicity by references in Stanton's annotated Codes of Practice and in other State publications.

In 1865 the clerk's office of the Court of Appeals, with all the records of appeals, was destroyed by fire, and the manuscript opinions of the days before that great fire can no longer be drawn upon for authorities. But the "Kentucky Law Reporter" and the "Southwestern Reporter" have lately undertaken to publish *all* the opinions of the Court of Appeals, whether marked for publication or not, and thus a great deal of matter is thrown upon the profession, which, though it may shed light upon some of the questions of the day (such as the construction of charters), soon becomes worthless. The Kentucky Law Reporter publishes even the opinions (or short abstracts from the opinions) of the Superior Court, a temporary and subordinate court of appellate jurisdiction, and these have repeatedly been referred to by the Court of Appeals. At present the Kentucky Law Reporter does not publish an opinion till it has become final: that is, when the time to petition for a rehearing has expired, or when the petition has been overruled.

As a general proposition, however, the opinions which are not published by order of court in the printed reports, are held of less weight than those officially reported, and those of the Superior Court are hardly held to be authority except on questions which in their nature, on account of the small amount that must be involved in them, can not reach the Court of Appeals.

NOTE.—The writer's attention has been drawn by Mr. Thomas Speed, of the Louisville bar, a gentleman deeply interested in the pioneer history of Kentucky, to the early dates at which the reporting of judicial decisions began in this State. Kentucky reports date back as far as those of New York, and antedate Georgia, Delaware, and Rhode Island by over forty years.

BOOK FIRST.

CONSTITUTIONAL AND POLITICAL LAW.

CHAPTER II.

LIMITATIONS HAVING FEDERAL SANCTION.

SEC. 8. Sacredness of Legislative Charters.

SEC. 9. Contracts other than Legislative Charters.

SEC. 10. Due Course of Law.

SEC. 11. *EX POST FACTO* Laws and Bills of Attainder.

SEC. 12. Other Federal Restrictions.

SECTION 8. SACREDNESS OF LEGISLATIVE CHARTERS.
Those limitations which both the National and the Kentucky Constitution impose on the law-making body, in the same or in equivalent words, are ultimately construed by the Supreme Court of the United States, at least where the highest State court does not carry them far enough.

Such are the restrictions against laws impairing the obligations of contracts (the words "obligation of" are omitted in the Kentucky Constitution), *ex post facto* laws, bills of attainder, and statutes depriving any one of life, liberty, or property "without due course of law," or, in the Kentucky phrase, borrowed from Magna Charta, otherwise than "by the law of the land."

But should the highest Kentucky court give to the restrictive clause greater force than the Supreme Court at Washington, there can be no appeal. Thus, the Court of Appeals, in 1860, as to the Shelby College lottery grant, held incidentally

that the franchise granted by the legislature to draw a lottery for the benefit of that college could not be repealed in so far as its existence was needed to repay certain advances of money made on the faith of it; because, if such a repeal was allowed to affect the rights of a third party thus acquired, this would be a law impairing the obligations of contracts, within the meaning of the Dartmouth College Case.¹ The Supreme Court (U. S.) has since held on the contrary, that laws dealing with moral questions are an exercise of that police power which the State can not abdicate, and of which it can not divest itself by its own contract, nor through contracts made by others on the faith of a statute.² Yet the Kentucky court might (though it is to be hoped would not), in the next case of a repealed lottery franchise under which contracts had been made, stand on the opinion rendered by their predecessors in 1860. It was incidentally said by the Court of Appeals in 1855, in the case of a lottery grant, that where a bonus has been paid for a franchise granted by the legislature no tax can be levied upon it afterward.³ The guarantee of the State Constitution against "laws impairing contracts" was referred to in 1869 when the court refused to sustain an act lowering railroad fares fixed by charter.⁴

The chartering of a turnpike company with the usual powers does not prevent the legislature from afterward increasing its liability for negligence in common with all other persons and corporations,⁵ nor from passing an act authorizing the sale of its franchise for debt;⁶ nor does a clause in an insurance company's charter, directing that all suits on policies must be brought in the home county, debar the legislature from directing thereafter, by a general law, that suits growing out of the contracts of any agency may be brought in the county of such agency,⁷ as a fair control of remedies must

¹ Gregory v. Trustees of Shelby College, 2 Metc. 589.

² Stone v. Mississippi, 101 U. S. 801.

³ Wendover v. Lexington, 15 B. M. 234, relying upon Gordon v. Tax Appeal Court, 8 How. 133.

⁴ Hamilton v. Keith, 5 Bush, 458.

⁵ Board Int. Impr., Shelby County, v. Searce, 2 Duv. 576.

⁶ Louisville & Oldham T. P. Co. v. Ballard, 2 Metc. 165.

⁷ Howard v. Ky. & Lou. Mut. Ins. Co., 18 B. M. 282.

always be considered as reserved. The special remedies given to a corporation, such as the methods by which a railroad company may condemn lands, are not a part of the State's contract, and are subject to repeal.⁸

On the 14th of February, 1856, a law was enacted which is deemed to be still in force, and which provides "that all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal, at the will of the legislature, unless a contrary effect be therein plainly expressed: *Provided*, That whilst privileges or franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."⁹ This law becomes a part of every subsequent charter or charter amendment.¹⁰ But another section of the act says that it "shall only apply to charters and acts of incorporation to be granted hereafter," and it was said¹¹ that an extension of a bank charter granted after 1856 does not come under this head; that the old charter remains with its irrepealable privileges; and, when a charter granted before 1856 reserved to the legislature the right of appeal, that of modifying was implied.¹² But though the charter of a turnpike company was expressly open to modification and repeal, it was held in a very late case that the legislature could not, without the consent of the corporation, take the property out of the hands of the stockholders who were then controlling it, by changing the basis of voting so as to give one vote for each share, while until then the larger stockholders had been restricted to fewer votes than one for each share.¹³ As the amendatory act gave to the majority in value of the owners the control of their property, it seems somewhat strained to

⁸ *Chattaroi R. R. Co. v. Kinner*, 81 Ky. 223; *Tracy v. Elizabethtown, etc. R. R. Co.*, 86 Ky. 270, 276.

⁹ *Stant. Rev. Stat.*, Ch. 62, II. 121.

¹⁰ *Griffin v. Ky. Ins. Co.*, 3 Bush, 592.

¹¹ *Franklin County Court v. Deposit Bank of Frankfort*, and cases heard with it, 87 Ky. 370, 387.

¹² *County Judge of Shelby v. Shelby R. R. Co.*, 5 Bush, 227.

¹³ *Orr v. Bracken County*, 81 Ky. 593. It appears to us from the tone of the opinion that the large stockholders were suspected by the court of the intention to wreck the turnpike with a view to gain in some other enterprise.

say that such an act, "deprived the corporation of its property." Here the court carried to the utmost the principle of a decision made in 1854. In that case the charter of a Baptist seminary reserved the right to "alter, amend, or repeal," and corporate affairs were ruled by a board of trustees filling its own vacancies. An act was passed in 1848, which the board refused to accept, adding sixteen new trustees named in the act to the old board. "The power to destroy is not the power to maim and cripple," said the court, and, notwithstanding the reservation, held the act unconstitutional. The old trustees represented the donors, and the new ones did not, and their intrusion was simple spoliation.¹⁴

When do chartered rights become complete? Amendments to the charter of a railroad company authorized the County Courts of certain counties to subscribe stock, not exceeding named amounts, upon a previous vote of the people in approval. The vote was taken, and resulted in the affirmative, but the County Court refused to subscribe. The legislature thereafter repealed the authority of one of the counties to subscribe. This repeal was held permissible, even on the assumption that the vote had been given in proper form, and that it was an absolute direction to the County Judge to subscribe, and he a mere agent; for as long as he had not actually subscribed there was no contract.¹⁵ As the Constitution guarantees the chartered rights of private corporations only, not of those that are public or municipal, it becomes important to draw the line correctly between the former and the latter. The city of Louisville had endowed the Medical Institute with a valuable lot and buildings. The Institute was incorporated in 1840, with the right to hold the real estate, etc., which it then possessed, and such other estate as might be proper, and the "right was reserved to repeal, alter, and amend the charter." The Institute received but trifling donations from private sources. In 1846 the University of Louisville was incorporated, and in compliance with a certain

¹⁴Sage v. Dillard, 15 B. M. 340, 359.

¹⁵Cov. and Lex. R. R. Co. v. Kenton Co. Court, 12 B. M. 144.

plan formed in 1837, and with resolutions now passed by the Mayor and Council, the square of land previously granted by the city to the Institute was conveyed to the University. The charter of 1846 names eleven trustees; one of them to be president, the others to be divided into five classes, going out in two, four, and six years, etc.; vacancies arising by lapse of time to be filled by the Mayor and Council, and if not so filled, then by the other trustees. The other sections give the ordinary collegiate powers, and each department (law, medical, and academic) should, if required, receive from the public schools of Louisville a number of pupils, not exceeding six, on certain conditions. The "University" received, before 1851, a few donations of books.

The new charter of Louisville, enacted in 1851, sought to place the "University" under the management of the school trustees who would, from year to year, be elected by the people. It was held that the "University" was not a department of the city government, but a private corporation, and the attempt to abolish the old trustees unconstitutional.¹⁶

SEC. 9. CONTRACTS OTHER THAN LEGISLATIVE CHARTERS. The Kentucky courts have equitably enlarged the constitutional rule against the impairment of contracts by not allowing the legislature to make a contract for a party, or validating a grant which was void when made, as otherwise the party would be deprived of property held under executed contracts, which are as sacred as executory ones. Hence, a section in an act about conveyances, passed in 1831, providing "that in all cases where a deed of conveyance has been heretofore made by a *baron* and *feme*, and the same has been duly executed, but with this defect only, that a *dedimus protestatem* did not issue, etc.," the grantee may, after seven years' possession, quiet the title against such defect by bill in chancery, was, as to antecedent deeds, in agreement with the doctrine recognized in Ohio, held unconstitu-

¹⁶ *City of Louisville v. Pres. and Trustees University of Louisville*, 15 B. Mon. 642.

tional,¹ in opposition to the decisions in Pennsylvania and to the views of the Supreme Court of the United States.²

However, Judge Robertson, delivering the opinion of the court in a much later case, arising under a curative act of 1862, held the purchasers at a judicial sale of infant's land to their contract on the petition of the infant to confirm the sale as being beneficial to herself, although the statute by color of which the sale was made denounced such a decree as *void* for want of compliance with its terms (at least he assumes that it might be void in this sense), and he says, with some truth, that to speak of a statute creating a contract where there was none before, as a law impairing the obligation of contracts, is a *felo de se*.³ He took the ground that "void" in the law regulating these sales must have meant "voidable," at the instance of the party to be protected, that is, the infant, and with a view to his benefit only; and that if the infant be satisfied with the action of the confirmatory law, the purchaser can not complain; that such a law does not divest vested rights. The precedent was followed soon after in a case under the same statute.⁴ But in 1866 the legislature passed another act, not now in force (see Myers' Supplement, p. 752), under which the purchaser might ask to have the sale of infant's land confirmed when it yielded the full value and was otherwise fair, though there had been irregularities affecting the title; and this statute was sustained on the strength of the two preceding cases, although it must, if valid, rest on wholly different grounds.⁵ The infant had meanwhile come of age, and her property was no longer under the guardianship of the State, and it would seem that the attempt to validate the ineffectual contract which the State had made on her behalf during her infancy would come directly

¹ Pearce's heirs v. Patton, 7 Bush, 164 (1846), referring to Good v. Zercher, 12 Oh. Rep. 364. But as this case was afterward overruled (16 Oh. 599), Kentucky stands apparently alone.

² Saberlee v. Mathewson, 2 Pet. 412.

³ Thornton v. McGrath, 1 Duv. 349 (1866).

⁴ Woodcock v. Bowman, 2 Duvall, 508.

⁵ Boyce and wife v. Sinclair, 3 Bush, 261.

within the decision of *Pearce's heirs v. Patton*, quoted above (note 1).

A law which only changes the form of action,⁶ or the court in which suit may be brought,⁷ but leaves the remedy as effective as before, can not be impugned as impairing the obligations of a contract. But the Court of Appeals has gone pretty far in reprovng and defeating any attempt at rendering the remedy less effective, than it was at the date of the contract, by new laws; extending the length of credit on "replevy" or stay bonds, or on sale bonds under executions (such laws gave rise to the war of the old court and new court—see *supra*, Section 7⁸), or allowing a redemption on chancery sales when the bid is less than two thirds of the appraised value,⁹ or exempting from levy any property not previously exempted,¹⁰ and this though the debt has after the passage of the new law been merged in a new obligation. (See *infra* as to retrospective, Limitation, and other laws, Sections 21, 22.)

But a suspension of the courts by a law which was passed on the 21st of May, 1861, forbade all the civil courts of the State from doing any business until January 1, 1862, *except* that they might do a number of named things, which embraced all the usual activity of the courts, other than trying suits for money due on contracts or rendering judgments in such suits, was sustained by the Court of Appeals in February, 1862, by the reversal of a judgment which the Circuit Judge had rendered upon a promissory note in disregard of the act,¹¹ and in fourteen other appeals from other judgments rendered in the same Circuit Court, which came up in the following June.¹² The opinion rendered in the first case, and which was followed without any new reasons afterward, took the ground that "the courts" are no

⁶ *Grubbs v. Harris*, 1 Bibb, 567.

⁷ *Head v. Hughes*, 1 Mar. 373.

⁸ *Williams v. Blair*, and *Lapsley v. Brashears*, 4 Litt. 31; *Ib.* 45.

⁹ *Collins v. Collins*, 79 Ky. 88, under Act of April 9, 1878.

¹⁰ *Kibbey v. Jones*, 7 Bush, 244.

The contrary rule was laid down *arguendo* by C. J. Taney in *Bronson v. Kinzie*, 1 How. 315, and has been followed in many of the States. See *Cooley*, Const. Lim., *sub loco*.

¹¹ *Johnson v. Higgins*, 3 Metc. 567.

¹² *Barkley v. Glover*, 4 Metc. 44.

part of the remedy, and that the legislature had always exercised the right to regulate the terms, sometimes lessening the number of terms in the year. The court is silent on two points: 1. Whether the suspension of the courts for seven months and ten days in addition to the ordinary delay between term and term is reasonable. 2. Whether the act could truthfully be called a regulation of the courts, rather than of remedies, as it allowed the courts during the time of the so-called suspension to do every thing else but to render judgments for money due on contracts.

A case differing widely from all the preceding arose under an act amending the law of escheat, which professed to give all bank deposits at Louisville on which no money had been drawn for eight years, and the depositor not heard of for eight years, to the local school board, subject to the right of reclaiming it if the owner or his heirs should turn up. This was held to impair the obligation of the contract between the depositor and the bank, and the remedy against the school board was thought to afford no sufficient substitute, though it might have been held otherwise if the money had been ordered to be paid into the State treasury or into court.¹³

SEC. 10. DUE COURSE OF LAW. The twelfth section of the Bill of Rights closes with the words, taken from Chapter 29 of Magna Charta, "Nor can he (the accused) be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." "The law of the land" means the same as "due course of law" in the first section of the fourteenth amendment to the Constitution of the United States. This guarantee has been invoked to annul all attempts to enact self-inflicting penalties, or forfeitures and escheats, without office found; and it is rather odd that the legislature has again and again, for a variety of subjects, passed such void and ineffectual laws, when it could have made them effectual by providing some short and simple proceeding to enforce the penalty, forfeiture, or escheat.

To quiet the sadly disordered land titles of Kentucky, the legislature on the 7th of January, 1824, passed an act,

¹³ Bank of Louisville v. Board of Trustees, 83 Ky. 219.

the eighth section of which forfeited to the commonwealth, without inquisition or office found, or judgment, every tract of land of more than a hundred acres, unless the proprietor should clear a certain number of acres in each one thousand before the 1st of August, 1825. This was held unconstitutional: first, as violating the compact with Virginia, and the terms of the grants of the lands, and therefore impairing the obligations of contract; secondly, as punishing a man in the course of a civil suit without a prosecution "in the name of the Commonwealth of Kentucky," concluding in the words, "against the peace and dignity of the same;" thirdly, as taking a man's property from him without due compensation; and, lastly, as inflicting an "excessive fine" or "cruel punishment."¹ It is said in this case that the act of 1824 was passed to counteract the effect of the decision of the Supreme Court, U. S., in *Green v. Biddle*, which denied relief to occupying claimants against successful plaintiffs under Virginia patents, but that the Kentucky courts had always gone on relieving occupying claimants by compensation for improvements, notwithstanding the Federal decision.

Much more recently the question of a self-enforcing penalty arose under an act of January 12, 1825, "that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the State, the title of such lands shall vest in this commonwealth by virtue of this act without office found, etc." The lands had not been stricken off to the State, nor was the alleged forfeiture shown by any record entry, but the owner's failure to list the land appeared negatively. The court said (Fall Term, 1876):

"Self-enforcing penal statutes are repugnant to the plainest principles of justice, etc. (quoting *Gaines v. Buford* (see note ¹)). By the Magna Charta it is declared that no citizen shall be disseized of his freehold or be condemned but by the lawful judgment of his peers, or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defense."

¹ *Buford v. Gaines*, 1 Dana, 479, 517 (1833).

The common law rule that no freehold can be given to the king, nor derived from him, except by matter of record, it is further said here, may of course be changed by statute,² but the right of the owners not to be deprived of their property by a self-enforcing penalty stands upon higher, namely, upon constitutional ground.³

The Constitution of Kentucky "deprives" those who may send or accept a challenge to fight a duel with a citizen of Kentucky "of the right to hold any office of honor or profit," and imposes upon each person entering upon office an oath purging himself of such disability.⁴ Jones was elected Clerk of the Court of Appeals, and took the oath; but a "contesting board" found afterward that he was disqualified by having sent a challenge. He was thereupon indicted under a statute for usurping the office "after his election or appointment thereto shall have been declared by a court of competent jurisdiction illegal or void." It was held that, if the statute applied to one who had not been convicted on a regular prosecution for sending the challenge, it deprived him of his rights otherwise than "by the law of the land or the judgment of his peers." The effect of a sentence could not be given to the finding of a contesting board.⁵

The notice through which a hearing is obtained is in the discretion of the legislature. Motions against the sheriffs as collectors of revenue, and their sureties, are made on no other notice than that contained in the statute, which names the court in which and the day of the term on which they must be entered. In a very peculiar case the legislature authorized personal judgment to be rendered on constructive service, where an actual summoning of the defendants was plainly impossible. It was in an act of 1862, authorizing suit by the Commonwealth of Kentucky against the members of the so-called "Provisional Government" for State revenue seized by them. The judgment below is sustained on this point in

² As intimated in *Robinson v. Huff & Whitaker*, 3 Litt. 38.

³ *Marshall v. McDaniel*, 12 Bush, 378, 383.

⁴ Const., Art. VIII, Sec. 20.

⁵ *Commonw'th v. Jones*, 10 Bush, 725, overruling a dictum in *Morgan v. Vance*, 4 Bush, 323.

short and unsatisfactory words, but reversed on other grounds.⁶ The act of 1862 stands alone in this respect. The Codes of Practice of 1854 and 1876 are very precise in forbidding the courts from rendering personal judgment on any process other than a summons actually delivered within the State.

The guarantee of "due course of law" does not change the usual methods for assessing and collecting taxes. It was said in an early case, "the public revenue is recoverable not only without a jury, but without a judge,"⁷ though it seems that the Court of Appeals has treated the taxing power granted to incorporated cities and towns as standing upon a somewhat lower ground than the taxing power exercised directly by the commonwealth. (See *infra*: *The Power to Assess*.)

"Due process of law" or "the law of the land" having been defined in a preceding case⁸ as "a law that hears before condemning, etc.," the Court of Appeals held that a curative tax law, which, after intimating that the original assessments in a city for certain years were defective, ordered a reassessment of all lands and improvements on which the taxes for those years were not paid, and that in a suit on the new tax bills *no defense should be allowed*, but that the property was exempt or the tax paid, was unconstitutional, and did not merit the name of "the law of the land,"⁹ though a similar act had been sustained in California.

The court says as to assessment of taxes:

"The letter and spirit of the Constitution require that the citizen shall be warned and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power, etc."

The so-called Auditor's Agent Act of 1880 directed that where previously thereto the State had bought in lands of tax

⁶ *Burnam v. Commonwealth*, 1 Duvall, 211. See to the contrary, *Pennoyer v. Neff*, 95 U. S. 714, and the strict requirements as to process in *Newcomb v. Newcomb*, 13 Bush, 544.

⁷ *Harris v. Wood*, 6 Mon. 642.

⁸ *Varden v. Mount*, 78 Ky. 89. The definition is borrowed from Webster's argument in the Dartmouth College Case.

⁹ *City of Louisville v. Cochran*, 82 Ky. 15. (See *People v. Todd*, 28 Cal. 184.)

delinquents at the sheriff's sale, and the time for redemption under the former law had elapsed, the Auditor of Public Accounts might through his agent sell these lands, after advertisement, and give his deed to the purchaser, who might then sue for possession, alleging in his petition only the advertisement, the sale, and the auditor's deed, no defense being allowed but five which were enumerated in the act, and these only if the defendant could trace title back to the State. This law was held bad, being violative of the clause from Magna Charta which is found both in the State and Federal Constitution;¹⁰ and nothing else could be expected of a Kentucky court. But in this and the preceding case the court went further than it needed; for it denounced each of the laws in question also for dispensing with the pleading of certain facts on which the claim or title of the plaintiff rested, as if the Constitution of Kentucky contained a guarantee that in all suits, or at least in all suits for taxes, or on tax titles, the pleadings must be detailed and special.

That a tax sale for arrears of taxes under a law which does not provide for a notice of the sale, adapted to reach the present owner is void on constitutional grounds, is strongly intimated, though not fully decided, in a case arising under this Auditor's Agent Act. But this law was passed after the former delinquent owner of the land had parted with it.¹¹

Under a law regulating street assessments, notice was given of the time and place for receiving the work where the abutters charged with the cost might be heard in opposition: they had no hearing on the question of benefits. But the apportionment warrants could be enforced only by a court of equity which had authority to correct it and bring it within the law. This was held to satisfy all constitutional requirements.¹² The tax-payer's right to a hearing on his assessment will be discussed in Chapter V.

¹⁰ *Meguiar v. Henry*, 84 Ky. 1.

¹¹ *Quinlan v. Callaban*, 81 Ky. 620. See, on the other hand, *Oldham v. Jones*, 5 B. M. 458, 463.

¹² *Nevin v. Roach*, 9 Ky. Law Repr. 818 (affirmed on motion by the

S. C. of the U. S. in 128 U. S. p. 578).

That any one abutter will be benefited is not an open question in court. See *City of Ludlow v. Cin. South'n Railway*, 78 Ky. See *contra*, *Preston v. Rudd*, in Sec. 83.

In *Varden v. Mount*, already quoted, it was held (Hines, J.) that the legislature could not confer upon a town board (and for the same reason could not itself exercise) the power of directing the town marshal to impound all hogs found running at large in the town, and to sell them, without any judicial order, for his fees and the cost of keeping, and that such a sale would confer no title. It seems that the needs of taxation alone will justify a change of title by ministerial sale. But an ordinance which provided for the taking up of hogs and for having them sold under the order of a justice of the peace, though under a proceeding wholly *in rem*, in which the owners were not named, was sustained as constitutional and good in law.¹³

SEC. 11. EX POST FACTO LAWS AND BILLS OF ATTAINDER. Kentucky courts, like courts elsewhere, have held that only criminal laws fall under the name of *ex post facto*;¹ but as to these the prohibition has been carried very far in Kentucky, though by no means too far. In 1808 a law was enacted constituting the act of a free negro in coming into the State, and remaining in it thirty days, a public offense, to be punished on trial by the County Court. This was, of course, unconstitutional within the guarantee of the right to jury trial; and it having been thus declared by the highest court, a new act was passed in 1838 providing for a jury trial in prosecutions under the former law. The court held that the act of 1808, being unenforceable, must be laid out of view entirely, and that the defendant, having come to Kentucky before 1838, could not be punished or tried under the new act.²

The words "bill of attainder," strictly construed, mean only a legislative act which condemns to death and forfeiture of estate; but in a wider sense it may comprise a "bill of pains and penalties;" that is, an act by which the legislature imposes any punishment upon some one person or class of persons without a trial following the enactment and preceding the punishment. In 1862 the legislature declared that any citizen of Kentucky should, upon joining the Confederates, be

¹³ *McKee v. McKee*, 8 B. M. 433.

¹ *Fisher v. Cockrell*, 5 Mon. 133.

² *Commonwealth v. Edwards*, 9 Dana, 445.

deemed to have expatriated himself, and should thus, by losing his citizenship, lose his right to vote and to hold office. After the repeal of this law the Court of Appeals, in 1866, found occasion to pass upon it, and, comparing it to a bill of attainder, held that though the legislature had the right to punish rebellion by disfranchisement, yet this could only follow after judicial conviction, and could not be worked out by a condemnatory test oath.³ The opinion was not reported at the time, but the court ordered its publication in 1874 as a pendant to "Commonwealth v. Jones," already quoted.

An act ordering the convicts to work outside of the penitentiary buildings, under a lessee, in mines and on railroads, is not an *ex post facto* law; any place at which they work being in contemplation of law a part of the penitentiary.⁴

SEC. 12. OTHER FEDERAL RESTRICTIONS. Among the restrictions on the law-making power, which are found in the Federal Constitution only, the two most important are, that which intrusts to Congress alone the power to regulate commerce between the States, and that which guarantees to citizens of any State the privileges and immunities of citizenship in every other State. As the interpretation of these clauses must ultimately rest with the Federal courts, and as it is being settled by them on almost all disputable points, it is not important to follow in detail all the Kentucky decisions on these Federal reservations and guarantees. It may, however, be said that the Court of Appeals has loyally carried out both requirements. It has set aside all statutes which hindered free commerce with other States by discriminating against goods coming from them into Kentucky,¹ and all statutes discriminating against citizens of other States, though the discrimination was hidden by giving a privilege to the citizens of one town or

³ *Burkett v. McCarty*, 10 Bush, 758.

⁴ *Mason & Foard Co. v. Jellico Coal Mining Co.*, 10 Ky. Law R. 440. The objection was raised not so much by the convicts themselves, as at the instance of organized Labor.

¹ *Rash v. Holloway*, 82 Ky. 674.

The exemption of a peddler, who deals only in the produce or manufactures of Kentucky, from peddler's license is void; following *City of Lexington v. Milton*, 17 B. M. 280, and reversing the Sup'r Court, who held that the law containing the exemption repealed the whole peddler's license law.

county even against the other residents of Kentucky.² An ordinance of the city of Louisville discriminating against merchants having their principal place of business elsewhere, in the way of city license, was held void on the same ground.³

But the State has unlimited discretion in allowing or refusing corporations from other States to exercise any of their powers in its midst, and such corporations, though in some sense the citizens of the State from which they derive their legal life, are not citizens within the meaning of the "privileges and immunities" clause.⁴

² Daniel v. Trustees of Richmond, 78 Ky. 542. A town tax of 5 per cent on auction sales of goods not belonging to a citizen of the town or the county containing it is void *in toto*.

³ Fechheimer Bros. & Co. v. City of Louisville, 84 Ky. 306.

⁴ Phenix Insurance Co. v. Com'th, 5 Bush, 76; Com'th v. Milton, 12 B. M. 219.

CHAPTER III.

LIMITATIONS OF STATE CONSTITUTION—RIGHTS AND REMEDIES.

- SEC. 13. Title and Contents.
 - SEC. 14. Forms of Legislation.
 - SEC. 15. The Taking of Private Property.
 - SEC. 16. Exclusive Privilege.
 - SEC. 17. Trial by Jury.
 - SEC. 18. Interference with Pending Suits.
 - SEC. 19. Style and Process.
 - SEC. 20. Suits Against the State.
 - SEC. 21. Limitation Laws.
 - SEC. 22. Retrospective Laws.
 - SEC. 23. Conditional Laws.
 - SEC. 24. Miscellaneous Topics.
 - SEC. 25. General Principles.
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SECTION 13. TITLE AND CONTENTS. The present chapter will be followed by two others, in one of which the bearing of the Constitution on the machinery of the State, in the other on Taxation, will be more specially treated.

In applying to a statute the tests of the State Constitution we must, before we approach the substance of its directions, see whether it answers this requirement:

“No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title.” (Art. II, Sec. 37.)

A similar clause in the Constitution of Ohio is not enforced, but the courts of Kentucky, as of most other States that have engrafted such a clause in their constitutions, enforce the rule with reasonable strictness. Perhaps the courts of Kentucky go a little farther in their requirements than the courts of other States.

When an act relates to more than one subject, and the

title expresses but one, the law covered by the title is upheld; the rest only of the act is void.¹ When both title and contents are double or multifarious (such as "An act regulating appeals from justices and quarterly courts, and officers of the quarterly courts,") the whole act is void.² The last-named act could probably have been saved by such a title as "An act amending the law governing inferior courts."

The substance of the course of decisions was summed up in 1878 as follows: "The rule established is, that none of the provisions of a statute will be held unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title."³

The description of the object and contents of an act need not be very accurate. Thus, "An act for the *benefit* of" a named corporation was sustained, though its object was the judicial sale of the franchise at the suit of creditors, against the desire of the corporators.⁴

"An act to incorporate" any corporation is a title broad enough to cover all the franchises that are usually conferred, such as that of eminent domain in case of a railroad company, and the authority to cities and counties to subscribe stock and to issue bonds and levy taxes in order to pay therefor. In fact, the authority for such subscriptions, bonds, and taxes is nearly always given by acts with such a title. An act, passed under a title indicating nothing but a city charter, gave to the council the power to establish a lottery scheme for the benefit of the city schools, and to transfer the scheme. An equally divided court affirming, in 1878, sustained the grant, Cofer, J., dissenting in a very vigorous opinion.⁵

But when a law entitled "An act to amend the charter"

¹ *Fuqua v. Mullen*, 13 Bush, 467,
and previous cases there quoted.

² *Hinds v. Rice*, 10 Bush, 528.

³ *Howland Coal and Iron Works*
v. Brown, 13 Bush, 681-685.

⁴ *Louisville and Oldham T. P. Co.*
v. Ballard, 2 Metc. 165.

⁵ *Frankfort Lottery Case*, MS. Op.

1878.

of a city forbade the county clerk of the county containing it from recording a deed to any land in the city, unless a receipt for all overdue city taxes was exhibited to him, that part of the law was held not to be germane to the purpose expressed.⁶

A list of cases in which the objection (sometimes very far-fetched) was overruled,⁷ and a list of other cases in which it was sustained,⁸ are given in the notes.

SEC. 14. FORMS OF LEGISLATION. In order to become a law, a bill must be passed by each of the two Houses of the Legislature, and must then be approved and signed by the Governor; or "if any bill shall not be returned by the Governor within ten days (Sundays excepted) after it

⁶ *Wulftange v. McCollom*, 83 Ky. 861.

⁷ *Chiles v. Drake*, 2 Metc. 146; *Phillips v. Cin. and Cov. Bridge Co.*, 2 Metc. 219; *Johnson v. Higgins*, 8 Metc. 566 (where the words "and for other purposes" appended to the title was disregarded as surplusage); *Wilson v. City of Louisville*, 2 Duv. 299; *Gibson v. Belcher*, 1 Bush, 145 (an act to amend a part of the General Statutes, calling by an obvious mistake the "chapter" to be amended "article" of the same number); *Swift v. Commonwealth*, 8 Bush, 108 (the title containing twice the conjunctive "and"); *O'Bannon v. L. C. & L. R. R. Co.*, 8 Bush, 348; *McReynolds v. Smallhouse*, 8 Bush, 447; *Jacobs v. L. & N. R. Co.*, 10 Bush, 263 (hard to reconcile with the principles elsewhere defined); *Collins v. Henderson*, 11 Bush, 74; *Brown v. McGee*, 12 Bush, 428; *City of Covington v. Voskotter*, 80 Ky. 219; *McArthur v. Nelson*, 81 Ky. 67; *Citizens' Gas Light Co. v. Louisville Gas Co.*, 81 Ky. 263; *Ky. Union R. R. Co. v. Bourbon Co.*, 85 Ky. 98; *Kreiger v. Shelby Railroad Co.*, 84 Ky. 86

("manner of voting" in the title covers provisions for declaring the result of the vote); *Stickrod v. Commonwealth*, 86 Ky. 285 (title forbidding "sale of liquor" covers prohibition of gift or loan of liquor); *Rogers v. Jacob*, 11 Kentucky Law Reporter, 1.

⁸ *Chiles v. Monroe*, 4 Metc. 72; *O'Donoghue v. Akin*, 2 Duv. 478; *Rushing v. Sebree*, 12 Bush, 198; *Pennington v. Woolfolk*, 79 Ky. 18 (an act providing certain proceedings to be instituted for the collection of State Revenue leading to the sale of delinquent lands, the County Attorney to conduct the proceedings, under the title "An act to amend Article 3 of Chapter 5 of the General Statutes," which article regulates the duties of county attorneys). In *Jones v. Thompson's ex'r*, 12 Bush, 394, "an act increasing the jurisdiction of Justices of the Peace in" certain counties, according to its title, was held bad as to provisions allowing and regulating the appeal in cases under the new jurisdiction, which seems little in accord with any practicable method of legislation.

shall be presented to him, it shall be a law," unless the General Assembly should by their adjournment prevent its return; or, lastly, the bill may be passed over the Governor's veto by a majority of all the members elected to each House voting in the affirmative.¹ No question seems to have yet risen under the present Constitution, as to whether any law has actually passed these stages.

But within the two Houses the progress of a bill is also regulated by or dependent upon the following provisions of Article II (concerning the Legislative Department):

"Nor shall a session of the General Assembly continue beyond sixty days, except by a vote of two thirds of the members elected to each House." (Section 24.) Should the session be prolonged without such a vote, all bills passed thereafter would be void; but if the required two-thirds majority has once extended the session, though for a given time only, it may thereafter be further extended by an ordinary majority vote.²

"All bills for raising revenue shall originate in the House of Representatives." (Section 30.)

But an act which required certain court officials of Jefferson County to pay the net excess of their fees over a stated yearly salary into the State treasury (through the trustee of the jury fund), though really levying a tax upon these officials, was held not to be within the rule, which was said only to contemplate taxes levied upon the people at large.³ A bill for authorizing a municipal tax in some city or town need not originate in the House.⁴

No "act or resolution for the appropriation of any money or the creation of any debt" over \$100 can be passed otherwise than by a yea and nay vote, a majority of the members elected to each House voting aye. (Section 40.)

The courts can not take judicial cognizance of the journals. Hence, a party denying the lawful enactment of an enrolled

¹ Const., Art. III, Sec. 22.

² Speed & Worthington v. Crawford, 8 Metc. 207; McNeill v. Commonwealth, 12 Bush, 732.

³ Commonwealth v. Bailey, 81 Ky. 395.

⁴ Rankin v. City of Henderson, 9 Ky. Law Rep. 861.

bill would have to bring the journals before the court by proof, and, when proper, by pleading, in order to show that a revenue bill originated in the Senate, or that an appropriation bill did not receive the necessary affirmative vote on call of ayes and nays.⁵

And as the courts can make no intendments against the power of the legislature, the requirements of Section 40 will not be applied to an act which authorizes (under Article VIII, Section 6) a suit to be brought against the commonwealth, though the last result will be (as it was in the case quoted below) the drawing of a warrant on the treasury for more than \$100 in satisfaction of the judgment;⁶ nor will they apply it to a bill for authorizing three commissioners to make an award on an old claim against the commonwealth.⁷

The constitutional requirement that each bill must be read on three several days in each House, unless the reading be dispensed with by four fifths of the House (Section 29) has never been invoked (so far as reported cases go) against the validity of any act apparently passed, and would hardly be listened to in the courts.

SEC. 15. THE TAKING OF PRIVATE PROPERTY. Among the restrictions which the State Constitution places on the law-making power, and to some extent upon the discretion of the courts, we shall consider first some of those which the Federal Constitution in its first ten amendments imposes on the Congress and Federal Judiciary, but not upon the States. Here the State courts are not compelled to follow the ruling of the Supreme Court of the United States, though generally inclined to do so.

The sacredness of private property as against the power of eminent domain is the most important and most familiar of these restrictions.

It is thus expressed in the Constitution of Kentucky:

“Nor shall any man’s property be taken or applied to public use *without the consent of his representatives*, and without just compensation being previously made to him.” (Article

⁵ Auditor v. Haycroft, 14 Bush, 284.

⁷ Hewitt, auditor, v. Craig, 86 Ky.

⁶ Com’w’t’h v. Jackson, 5 Bush, 680. 28.

VIII, Section 14.) The object of the words in italics is not clear, as they can mean nothing but that a statute passed by representatives of the whole people must authorize every taking. This clause does not, in so many words, guarantee a man's property against injury inflicted under statutory authority where such an injury is not done by an actual *taking*. But the doctrine stated in Cooley's Constitutional Limitations, third edition, p. 545, "So a partial destruction or diminution of the value of property by an act of the Government, which directly and not merely incidentally affects it, is to that extent an appropriation," has been approved in a suit for damages by the owners of the lot against the city, which in filling the street in front of the lot threw the surface water back upon it; and this without regard to the skillful or negligent manner of planning and doing the work. It was said, "The right of compensation in this case is as clear as if the lot of appellants had been taken."¹ The difficulty is to determine what is "direct" and what is "incidental."

The first case involving the question came up in 1836, where the city of Louisville had raised the grade of the street in front of plaintiff's house with a view to proper drainage.² The court found that the evidence tended to show only *inconvenience* had resulted to the plaintiff; that his lot had not been intruded on or touched, nor had water been thrown on it, nor had it been made unhealthy; that the city could not be bound by the first grade of the street; that it might even close the street on which plaintiff's lot lay, under certain circumstances, but the resulting inconveniences would not entitle him to damages. A judgment for defendant was affirmed. The same decision would probably now be given on the facts, but the power of closing the streets without the consent of the abutters would not be thought of as at all admissible.³

¹ Kemper and wife v. City of Louisville, 14 Bush, 87.

² Keasy v. City of Louisville, 4 Dana, 154.

³ City of Covington v. McNickle's heirs, 18. B. M. 262. "Every owner of ground on any street in Louisville

has a right . . . to the use of the contiguous highway, so far as it may be necessary for affording him . . . and a convenient outlet, etc. Of this right the legislature can not deprive him without . . . compensation." Transylvania University v. City of

The same question came up in a more serious light in 1868. In 1865 a new and higher grade was ordered for Brook Street in Louisville, where a rolling-mill had been erected on the faith of the old grade of 1836; along a whole square. The new grade could not well be made without rendering it necessary to fill up the rolling-mill lot at an enormous expense; or, if a wall was raised in place of the filling, the mill must be deprived of light and air, and rendered almost useless. A majority of the court distinguished the case from that preceding, and sustained a temporary injunction against the work, to remain in force until the city should adopt a general plan of improvement, with compensation to those injured by it. A manuscript opinion⁴ was quoted to the effect, "*Private rights must be regarded*; the public must so use its own as not to injure another's property." And the decision was rested in part on the second section of the Bill of Rights, of which hereafter.⁵

The question as to a railroad running trains through a city came up first in 1839. The cars of the Lexington & Ohio Railroad, for local travel, moved sometimes by steam and sometimes by horses, were put on a street ninety feet wide in a thinly settled part of Louisville, with the consent of the Mayor and Council given in pursuance of the city charter. Chancellor Bibb, on the complaint of abutting owners, who showed some inconvenience arising to them, enjoined the running of the cars; the Court of Appeals reversed his decree, holding that there was neither nuisance nor purpresture, and that if some of the abutters should suffer inconvenience or loss from the changed mode of travel, it was no more than the dwellers in a growing city must expect.⁶ The ruling was followed in favor of a steam railroad passing through Frank-

Lexington, 3 B. M. 25, 27 (1842). A manuscript opinion of October. 1889—Gargan v. City of Louisville, 11 Ky. Law Rep. 489—holds that it is "injurious" to a lot owner, and therefore not permissible, without money compensation, to close up the eastern end of the street on his square so that to go eastward, toward the

center of trade, he would first have to go west to the next street, thence north or south to another street, thence east.

⁴ Louisville v. Lyon, Dec. 19, 1856.

⁵ City of Louisville v. Louisville Rolling Mill, 3 Bush, 416.

⁶ Lexington & Ohio R. R. Co. v. Applegate, 8 Dana, 289.

fort, though it laid its track on an embankment four feet high and twelve feet wide along the middle of the street in front of the plaintiff's house.⁷ But where the track was laid in a city, over a narrow strip between the line of houses and a water-course, leaving less than ten feet between the house walls and the side of passing cars, so that there was no ingress and egress for vehicles, and sparks and smoke would enter the windows, it was held that the damage was direct, and that the owner should recover the diminution in the value of his property.⁸ In another case, decided also at the Summer Term of 1874, Judge Lindsay sought to lay down the law in more general terms:

"The right of the authorities of a city, with legislative warrant to permit the construction and operation through its streets of railroads upon which trains of cars are propelled by steam, is not now an open question in this State. . . . (it) is not *per se* an encroachment upon the property rights of (the abutters). . . . Those who purchase lots bordering on a street take their title subject to the appropriation of the street to such public uses promotive of commerce and business as the general good of the city or town may demand. . . . The appropriation must not be incompatible with the ends for which the street was established. It must not deprive the persons living on the street of its reasonable use as a passway for foot passengers, horsemen, and the vehicles in general use."

Finding that this use would not be materially impaired, the court affirmed a judgment refusing an injunction.⁹

⁷ Lexington & Frankfort R. R. v. Brown, 17 B. M. 772 (1857).

⁸ Elizabethtown L. & B. S. R. R. v. Combs, 10 Bush, 882 (1874). But in J. M. & I. R. R. Co. v. Esterle, 13 Bush, 667 (1878), a suit of a house owner against a railroad company running steam cars in front of his house, and doing some injury to it, it was said (p. 675) that the rules applicable to the taking of private property did not govern it; that the lot owner had a constitutional right to the free use of

the street; but that the street had not been wholly appropriated, and was still to some extent open to the public. The action was sustained, but the rule for measuring the damages and allowing of deductions for benefits in such cases was stated with such refinement (p. 677) that we rather refer the reader to it than attempt to abridge it.

⁹ Cosby v. O. & R. R. R. Co., 10 Bush, 288.

As the Constitution guarantees to the unwilling owner *previous* compensation, it would seem that, in all cases in which injury is threatened by the running of steam cars, the lot owners should have an injunction as of right. This claim has, however, been met thus in a recent suit brought against the so-called "Short Route:"

"Whether any special and substantial injury will result to the adjoining owners is as yet a mere matter of speculation; . . . the extent can be much better estimated after the road is in operation, and at most it would be a matter of mere damage, for which the law affords an adequate remedy; . . . if he (the owner) suffers substantial injury by having smoke, sparks, and cinders thrown into his house, or its walls be cracked by the movement of heavy trains, he would be entitled to recover for damages," etc.¹⁰

The constitutional measure of damages was thus laid down in an early case: "The citizen has a right to insist on being paid for the thing taken from him, although he may be incidentally benefited in the appropriation of it to public use. If, however, he seek indemnity for consequential inconvenience or injury, then the true question will be, whether upon a survey of all advantages as well as disadvantages . . . the balance will be for or against him."¹¹ And this doctrine has been lately approved, the court remarking that the statute regulating indemnity must be construed in subservience to the Constitution.¹² The true measure of compensation, aside of consequential damages, is "the value of the land to the owner, considering its relative position to his other land, and other circumstances tending to diminish or enhance such value."¹³

To the rule against deducting benefits from compensation there is an apparent exception. The legislature may, with even-handed justice, direct that all the streets of a city shall be opened by purchase or condemnation, at the cost in whole

¹⁰ *Fulton v. Short Route R'y Transfer Co.*, 9 Ky. Law Rep'r, 291 (1887), followed in *Hyland v. same*, 10, *ib.* 900.

¹¹ *Sutton's heirs v. City of Louisville*, 5 Dana, 28.

¹² *Elizabethtown & Paducah R. R. Co. v. Helm's heirs*, 8 Bush, 681.

¹³ *Henderson & Nashville R. R. Co. v. Dickerson*, 17 B. M. 180; *L. & N. R. R. Co. v. Thompson*, 18 B. M. 744.

or in part of the abutting owners. Generally the owner of the condemned strip will be also the owner of the lot extending back of it; and if, in the latter capacity, he is made to pay more than he will receive in the former, he can not object, only the city must pay him first before it can enter on his land.¹⁴

An act of April 11, 1882, in its twelfth section sought to enable a railroad company to take possession of land after a verdict fixing value, upon giving bond for double the amount, while carrying on an appeal to a higher court. This provision is clearly bad, as the compensation must come "previous" to the taking, and was so declared in two cases in 1888:¹⁵

A chose in action is property, even when it arises from tort. The Kentucky "Amnesty Act" of February 26, 1867, forbade any suits to be brought thereafter for torts committed during the war by either Union men or Confederates under color of belligerent rights. In a suit against a Confederate officer for forcibly taking the funds of a bank, the court first decided that the capture could not be justified as a belligerent act, and that the amnesty law, however laudable in purpose, sought the public good at the expense of the individual, without compensation; that his chose in action was property, and its destruction by this amnesty law was made in disregard of the constitutional guarantee.¹⁶

As private property can not, without compensation, be taken or applied for public use, it can, of course, with even less reason, be taken for private use,¹⁷ either with or without compensation. The legislature can not order lands to be sold for reinvestment, as it sought to do in Section 491 of the Civil Code of Practice of 1876, at the suit of the life tenant against the remainderman, though for the professed benefit of both, if

¹⁴ *City of Covington v. Worthington*, 11 Ky. Law Rep. 141.

¹⁵ *Covington Sh. R. T. R. W. Co. v. Piel*, 87 Ky. 267; *Asher v. L. & N. R. R. Co.*, *ib.* 391.

¹⁶ *Terrell v. Rankin*, 2 Bush, 461.

¹⁷ *Scuffletown Fence Co. v. McAllister*, 12 Bush, 817, and cases there

quoted. In *Hancock Stock and Fence Law Co. v. Adams*, 87 Ky. 417, an act authorizing the farmers of a district to surround their lands with a common fence was held void, in favor of an unwilling neighbor, even as far as it forced the fence on his land against his will for the benefit of the others.

the latter be of full age and objects; he has the right to decide for himself,¹⁸ but the law might, as a matter of necessity, cause lands, which can not be well divided in kind, to be sold in order to divide the proceeds.

The judgment in a condemnation suit, which fixes the rate at which a railroad company or other body, intrusted for its purposes with the power of eminent domain, may buy a strip of land or right of way without the owner's consent, does not confer on him any vested right. Hence, the legislature may, after such a judgment is entered, by an amendatory act give to the corporation the right of appeal.¹⁹

The guarantee against taking private property for public use has been invoked in Kentucky against arbitrary, unequal, and excessive taxation by some of the best and ablest judges,²⁰ though this extension of its meaning is rejected by the courts of other States.

And in such other States in which the words of the Constitution do not demand "compensation in money," or otherwise negative the deduction of benefits, this guarantee has not generally been construed as forbidding this setting off of "benefits" from the value of the property or right of way taken for public use.²¹

On the vexed question, whether the legislature can, under its police power, declare the liquor traffic a nuisance, and thereby render property fitted up for its pursuit worthless, thus taking it virtually from its owner for the supposed good of the public, the Court of Appeals has shown its agreement with the Supreme Court of Kansas by deciding, in one of the many local option cases,²² in favor of the legislative power.

¹⁸ *Gossam v. McFerran*, 79 Ky. 236; and land can not be condemned for a private passway, *Robinson v. Swope*, 12 Bush. 21.

¹⁹ *Henderson & N. R. R. Co. v. Dickerson*, 17 B. M. 178, 177.

²⁰ In *City of Lexington v. McQuillan's heirs*, 9 Dana, 513, 518, C. J. Robertson says that to allow a man's

property to be taken from him under the name of a tax, but in fact by an act of spoliation, would turn this guarantee into a *brutum fulmen*. See also C. J. Marshall in *Cheaney v. Hooser*, 9 B. M. 330.

²¹ Cooley, *Const. Lim.* p. 569.

²² *Burnside v. Lincoln Co. Court* 86 Ky. 424.

SEC. 16. EXCLUSIVE PRIVILEGES. The first section of the Bill of Rights, which says that "no man or set of men" shall have "exclusive, separate, public emoluments or privileges" "but in consideration of public service" has been referred to in Section 3 as the most striking passage in the Kentucky Constitution. Its effect in disallowing tax exemptions will be adverted to in a section of a subsequent chapter, "Uniformity and Moderation." For many years it seemed to be almost a dead letter, till attention was drawn to it, when a specially chartered Building and Loan Association recovered judgment on a loan with interest above the ordinary lawful rate, in accordance with a clause in its charter authorizing it to grant its loans to the bidder of the highest premium. In passing on the constitutionality of this clause the court remarks, first, that whatever privilege could have been granted to a corporation might as well have been granted to an individual; and, having put the question, "Could the legislature by special act authorize one named person to charge and collect a greater rate of interest than was permitted by general law?" answers it thus: "It seems to us that a bare statement of the question is all that is necessary to its decision. It is our boast that under our government none are entitled to exclusive rights, but that all are governed by equal laws."¹

The point was new; the decision against the validity of the charter caused some surprise, and broke up this and all similar associations in the State. The court admitted that it had found no direct authorities on the subject, but its judgment has been generally approved.

The privilege had been granted to a loan association, in its charter, of selling mortgaged property under powers of sale (which is otherwise forbidden by statute): this was also held to be invalid, with the remark, that though privileges

¹ Gordon v. Winchester B. and L. Association, 12 Bush, 110, 113 (1876). Yet the courts have always sustained the clause in each bank charter which puts notes discounted therein on the footing of bills of exchange, and that

which allows the bank to calculate their discount on a slightly more favorable scale than ordinary interest. But this is justified (see p. 115) on the ground that incorporated banks render some public service.

may be given in connection with a franchise of a public character "such as a turnpike or ferry," it can not be done as to ordinary avocations open to every individual.² The grant to an agricultural society of the exclusive right to "receive horses for pay" within a named distance from its fairs, supported by the infliction of fines upon all competitors, is clearly untenable as the grant of an exclusive privilege without public service.³ It had long been usual to pass private acts extending the time for named court clerks or sheriffs in which to collect their fee bills, such acts being quite popular, as they made these officers more lenient in collecting. But when such an act, in 1883, came before the Court of Appeals, though the long practice of almost all General Assemblies to pass acts of this character was admitted, it was held clearly void.⁴

Where a special privilege (that of setting up a lottery) was invoked to fend off a criminal prosecution, the grantee being indicted under the general law, the Court of Appeals was equally divided, and thus sustained the judgment of acquittal rendered below; but the public opinion of the bar leans greatly to the side of the two judges who held the act entirely void.⁵

But when we come to banks, railroad companies, and similar corporations, the decisions take another turn. An act was passed shortening the time in which to sue one named railroad company for injuries to live stock from five years to six months. A former act had increased the liability of the same railroad company for injuries to live stock beyond the rules of the common law. But the new and short limitation would apply to all cases alike. A narrow question arose, but the law was sustained, partly as being a mere diminution of the former hardship imposed on the corporation, but mainly because in the nature of things "exclusive and separate rights" must be granted to

² Kentucky Trust Co. v. Lewis, 85 Ky. 579.

³ Com'nw'th v. Bacon, 13 Bush, 210.

⁴ Smith, g'd'n, v. Warden, 80 Ky. 608.

⁵ Commonw'lth v. Whipps, 80 Ky. 269. (Other lottery franchises were always granted under some plausible pretext, as that of aiding a college, library, etc.)

all corporations, and especially to railroad companies, presumably in return for their public services.⁶ On the same ground it was held that the legislative charter of a fiduciary company, which allows it to qualify as guardian, executor, trustee, etc., and to give bond without surety (simply pledging its capital), both when qualifying in the County Court and when asking the sale of trust lands from the Chancellor, is valid."⁷

When a public service or other equivalent is in good faith demanded for an exclusive privilege, the courts can not inquire into its adequacy; for instance, where the legislature leased a public work, with the power to charge tolls, to a private company, and did not stipulate for rent, but exacted a covenant to keep in repair.⁸

The Court of Appeals had at one time held that an irrevocable exclusive privilege to light a city with gas could not be well granted; but the Supreme Court of the United States having reversed its decision, the contrary doctrine has since been followed.⁹

A municipal corporation is a part of the State government, and not a "set of men." On this ground acts were sustained which cut down the limitation of a suit to recover back improperly collected taxes in favor of one city,¹⁰ and similarly shortened the limitation in certain suits for damages which might be brought against another city,¹¹ and which in a third city allowed the *capias pro fine* issuing from its police court to include the costs of the prosecution, while these can not be thus collected under the general law.¹² These decisions lose some of their force as illustrating the higher level of municipal over private corporations, by those already quoted as having been rendered in favor of the latter.

⁶ O'Bannon v. L. C. & L. R. R. Co., 8 Bush, 848.

⁷ Johnson v. Johnson, 10 Ky. Law Rep. 860.

⁸ McReynolds v. Smallhouse, 8 Bush, 447.

⁹ Citizens Gas Light Co. v. Louisville Gas Co., 81 Ky. 270, reversed in

115 U.S. p. 683. The reversal followed in City of Newport v. Newport Light Co., 84 Ky. 166.

¹⁰ City of Covington v. Hoadley, 83 Ky. 444.

¹¹ Preston v. City of Louisville, 84 Ky. 118.

¹² Berry v. Brislan, 86 Ky. 5.

This section of the Bill of Rights does not interfere with localizing laws to the utmost. An act which forbids the floating of loose logs in a certain river below a named point, while allowing it above that point, was sustained; it will not be presumed that the legislature intended to favor the men in one neighborhood more than in another, but that the distinction was made on good grounds and in the public interest.¹³

And where the members of the bar are given a voice in the selection of a Commissioner in Chancery (and they alone elect special judges) it is supposed that they will derive no profit therefrom.¹⁴

The permission which in a "Local Option" act is reserved to physicians to prescribe and sell alcoholic drinks as medicine only, while no one else may sell them at all, has also been sustained on like grounds.¹⁵

SEC. 17. TRIAL BY JURY. Two provisions are found in the Constitution which guarantee the right of trial by jury, aside from the clause about "the judgment of his peers."

Section 8 of the Bill of Rights, looking mainly to civil causes, reads: "That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

As the Constitutions of 1792 and 1799 contained clauses to the same effect (without the limiting proviso), it seems that the right of trial by jury can not be taken away in cases where the Virginia law, as it stood in 1792, gave it, though, of course, this mode of trial may be waived.

The other provision is in Section 12 of the Bill of Rights: "That in all criminal prosecutions the accused hath a right to have, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage."

¹³ *Evans v. Commonwealth*, 10 Ky. Law Rep. 29.

¹⁴ *Smith v. Cochran*, 7 Bush, 147. The right of the legislature to confer

the power of electing special judges on the bar has never been questioned.

¹⁵ *Sarrls v. Commonwealth*, 83 Ky. 827.

The test of the former Virginia law was applied to the former clause as early as 1801 in three cases reported in "Printed Decisions," in which three acts allowing judgment without the intervention of a jury were held void: one was a suit on behalf of the commonwealth for the value of public arms;¹ one for a civil penalty below five pounds;² the third case brought up the validity of a law which directed the Court of Appeals to render judgment against the surety in a supersedeas bond when affirming the judgment rendered below against the plaintiff in error.³

But summary proceedings without a trial by jury have been sustained against attorneys in favor of their clients for money collected, or to disbar attorneys because courts had at common law this power over attorneys and counselors: and against sheriffs and like officers for money collected by reason or color of office, though a question *in pais* may arise, such as whether the person actually collecting the money was acting as a deputy sheriff *de facto*.⁴ Courts may also be authorized to quash excessive fee bills made out by their clerks, and to fine these for such misconduct.⁵ This is not, as far as quashing the fee bills goes, to be considered a criminal prosecution, and as the courts of Virginia were in the exercise of this power before 1792, the clause holding the right to jury trial inviolable was not infringed. The fines imposed were from \$1 to \$4, and though the aggregate exceeded five pounds, the largest fine which a judge under Virginia law could impose without the verdict of a jury, it was said that the judge might impose each fine separately and then add them up to a greater sum than five pounds.

A little closer was the case of a voluntary subscription which was authorized by a local statute for the purpose of raising the cost of county buildings; the sums subscribed to be collected by the county clerk on summary notice and motion, without jury, in the County Court. This was called a "voluntary tax," and not within the guarantee of jury trial

¹ Stidger v. Rogers for Commonwealth, Pr. Dec. 52.

² Enderman v. Ashby, *Ib.* 53.

³ Gullion v. Boulware's admr's, *Ib.* 76.

⁴ Wells v. Caldwell, 1 A. K. Mar. 441.

⁵ Havieson v. Chiles, 3 Litt. 196.

any more than other taxes, which are, as it is said here, collected not only without a jury, but without a judge.⁶

Before the enactment of the General Statutes the Court of Appeals was authorized upon an appeal from the judgment of a Circuit Court, admitting or rejecting a paper propounded as a will, to retry the question of fact on the proof in the record, and to render final judgment of probate or of rejection. Having in the exercise of this power reversed the judgment of the lower court, which had been rendered on the verdict of a jury, the court was asked, in a petition for rehearing, to retrace their steps, as by taking the final decision upon the facts into their own hands they infringed the guarantee of the inviolable right of trial by jury. In conformity with the long-established practice of the court the point was overruled, and the power of a court was placed on the ground of the old English practice of trying the probate of wills in the Bishop's Court according to the forms of the civil law, without a jury.⁷ Here, however, the important point was overlooked, that under the old English law the probate of a will in the ecclesiastical court only bound the personal estate, while in any case affecting a freehold the execution of the will had to be proved before a court and jury, like any other conveyance, but in Kentucky the probate binds lands as well as chattels, and the will not admitted to probate can not be used for any purpose.

The present statute, however, gives to the verdict in a will case the same force as to any other verdict, and brings the law into full accord with the Constitution.⁸

It has been usual to provide juries of six men in inferior courts from which an appeal, triable *de novo*, lies to a higher

⁶ Harris v. Wood, 6 Monroe, 641.
• However, when the sheriff unlawfully distrains my goods for taxes I can sue him in replevin or trover, and in that action, all issues of fact must be tried by jury. But a judgment for the tax, though rendered on motion, without jury, is final and conclusive.

⁷ Willis v. Lochrane, 9 Bush, 547.

⁸ Gen. Stat., Ch. 113 (Wills), Sec. 27.

In like manner the Civil C. P. of 1876 has in Sec. 12 cured the infraction of this guarantee, which results from the great extension of equity jurisdiction, by giving to either party, in an action *properly* begun in equitable proceedings, the right to have the legal issues transferred to the "ordinary docket" for trial before a jury.

court in which a jury of twelve would be empaneled. Without such appeal it is hardly thought that the constitutional guarantee would be fulfilled, as a jury, without more to say, means twelve men.⁹

SEC. 18. INTERFERENCE WITH PENDING SUITS. With a few named exceptions the General Assembly may on all subjects pass private or special as well as public and general laws, subject to the rule that no exclusive privilege may be granted otherwise than in consideration of public service. Several times it has been attempted to help one party to a pending litigation by the passage of a private law. In four reported cases such laws were held void. First, it was a legislative divorce (not allowable under the present Constitution), which was granted while proceedings for divorce and alimony were pending in court: the effect of this legislative divorce would have been to cut off all property rights of the wife.¹ The next time, a railroad loan had been voted by a precinct not in accordance with the enabling act, and during the pendency of a suit brought to enjoin the loan another act was passed validating the loan.² In the third case a bank, which under its charter had no right to hold certain lands, but had otherwise a good title to them against a mere "intruder," obtained an act enabling it to hold lands while its action for the recovery of the land was pending: "The judicial, being a co-ordinate and independent department of the State government, can not consent that either one of the other departments shall interfere with it in the exercise of its exclusive right to determine the law of existing cases."³ The fourth case is again that of a local vote for a tax, an election held irregularly, though, as the court says, the tax (for a school) for the district might have been ordered by the legislature without any vote or other expression of opinion; suits are brought to enjoin the tax; during the pendency of these suits (January, 1886) an act was passed by the legislature giving validity to the election; this act was held to be void.⁴ The force of the decision is

⁹ *Helvestine v. Yantis*, Co. Judge,
11 Ky. Law Rep. 208.

¹ *Gaines v. Gaines*, 9 B. M. 295.

² *Allison v. L. H. C. & W. R. R.*

Co., 9 Bush, 248.

³ *Thweatt v. Bank of Hopkinsville*,
61 Ky. 1, 8.

⁴ *Norman v. Boaz*, 85 Ky. 557, 565.

somewhat weakened by this remark: "Of course this rule (that the legislature can not interfere, as shown in the three preceding cases) does not apply when the curative act relates only to irregularities and informalities." The "election" in this case is said to have been void, but what state of facts would have rendered it irregular only is left undecided.

To general acts the reasoning of these cases does not apply. It can not be said that the legislature undertakes to settle a dispute between A and B when it enacts a law applicable to all disputes of the kind. Such were the early acts abridging the rights of successful land claimants to rents, which were made to apply to pending suits,⁵ and which would in our days be held void, as taking one man's property (a chose in action being property) from him for the supposed good of the public by the general quieting of land titles.⁶

Of course, where the State is the plaintiff the legislature can order the dismissal of the suit, and municipal corporations, being only parts of the State, could not object to a legislative dismissal. In the case mentioned in Section 8, note 12, of an act repealing the power of a county to subscribe to the stock of a railroad during the pendency of a *mandamus*, the question of legislative interference with the courts was not raised.

SEC. 19. STYLE AND PROCESS. The Constitution, in its article on the Judiciary, regulates some formal points as to proceedings in court, both civil and criminal.

"The style of all process shall be 'The Commonwealth of Kentucky.'" (Article IV, Section 5.¹) A writ known as an "order of attachment," issued by the clerk of a court to a sheriff or like officer, is a process; and where it lacked the heading, "The Commonwealth of Kentucky to the Marshal of the L. C. C., greeting," it was held to be void, and to confer no jurisdiction on the court to deal with the property seized.²

The same section says further: "All prosecutions shall be

⁵ See *infra*, Sec 22, and see Fowler v. Halbert, 4 Bibb, 52, 56.

⁶ See Sec. 15, note 16.

¹ This provision is copied from the Resolutions of the Virginia Convention of 1776, which adapted the laws

of the colony to the new order of things, letting the words, "The Commonwealth of Virginia" take the place of the king's name and title.

² Yeager v. Graves, 78 Ky. 279.

carried on in the name and by the authority of the Commonwealth of Kentucky, and conclude, 'against the peace and dignity of the same.'"³

While this clause has been referred to as one of the reasons for not punishing men by confiscation of their property under guise of civil proceedings, or through self-executing laws, it has been limited in two directions.

First. It has been held that where the offense is not in itself infamous, and the punishment only a fine in money, the legislature may treat the proceeding as *quasi* civil, somewhat like a *qui tam* action of debt, and may allow a local body to regulate by ordinance such offense, and its punishment by fine in the city or town court, and this, though the fine be enforceable by imprisonment, and to be "worked out"; and the prosecution looking to this fine may, if the laws thus provide, be carried on in the name of the city as plaintiff.⁴ Yet, as the offense, in that case a breach of the peace, might be prosecuted by indictment, this view seems to conflict, not only with this clause, but also with Section 13 of the Bill of Rights (Section 11 in the Constitution of 1799) which directs that "no person shall for any indictable offense be proceeded against criminally by information, etc." The best justification for the decision in favor of these so-called "ordinance warrants" is long and uniform usage under the present and former Constitutions.

Second. The power of courts to punish contempts committed in their presence is inalienable, and the law-making department, though it may regulate, can neither take this power away, nor cripple it, and the old common law process to punish contempts upon rule and attachment is not taken away by the constitutional provisions, and though a judge can not under the statute⁵ inflict a fine of more than thirty dollars, nor imprisonment for more than thirty hours, without the intervention of a jury, yet the old mode of prosecution,

³ This clause has the same origin; the words are to supplant the old form, "Against the peace of our Lord the King."

⁴ *Williamson v. Commonwealth*, 4

B.M. 146. See *Crim. C. Pract.*, Sec. 11. *Commonwealth v. Avery*, 14 Bush, 625; *Commonwealth v. Sherman*, 85 Ky. 686.

⁵ *Gen. Stat.*, Ch. 29, Art. 27, Sec. 1.

without indictment and without the formal words required in other cases, but modified by the introduction of a trial jury, remain in force, and when such jury intervenes a higher fine and longer imprisonment may be inflicted.⁶

SEC. 20. SUITS AGAINST THE STATE. The Constitution empowers the General Assembly to "direct by law in what manner and in what courts suits may be brought against the Commonwealth."¹

This is a tacit declaration that, without some law enacted for the purpose, no suit can be brought against the commonwealth; and this rule can not be avoided by suing some State officer nominally when judgment against the State is meant. Thus, a plaintiff in an insurance case obtained an attachment against the insurer, a foreign corporation, and attached the deposit in the hands of the State Treasurer, and, proceeding against him as garnishee, obtained a judgment. This judgment against the Treasurer was reversed on the ground of its being a judgment against the commonwealth not specially authorized by law.² Even a county school commissioner is, to the extent of the funds in his hands, a keeper of the commonwealth's treasure, and can not be garnisheed for the wages due to a school teacher.³

On reading the section of the Constitution, it would seem that a general law was contemplated, under which all suits against the commonwealth should be brought. But the usage of the legislature has been to authorize such suits to be brought in special cases only, thus, in fact, interpolating the words "in what cases" before "in what manner," and these special laws have been sanctioned by the courts, the Auditor of Public Accounts being compelled to draw his warrant for the judgment.⁴

But where a law has been passed, whether general or special, under which it is the duty of the Auditor of Public

⁶ *Arnold v. Commonwealth*, 80 Ky. 800.

¹ Art. VIII, Sec. 6.

² *Tate, Treasurer, v. Salmon*, 79 Ky. 540.

³ *Tracy v. Hornbuckle*, 8 Bush, 336, quoting *Divine v. Harvey*, 7 Mon. 439.

⁴ *Auditor v. Haycraft*, 14 Bush, 284, already quoted in Sec. 14.

Accounts to draw his warrant on the treasury in favor of any individual, for instance, the salary of a judge or other State officer, or the claim of a witness or juror or court official, certified by the proper court, he can be compelled by *mandamus* to issue the warrant,⁵ and the Treasurer can be compelled to honor the warrant.⁶ The provisions of the Civil Code of Practice on the subject of *mandamus* are not construed as a direction by law how and in what court to sue the commonwealth, for they do not specify writs against the Auditor to compel the issue of a warrant on the treasury; but the *mandamus* is allowed on the conception that the Auditor's duty in issuing a warrant is simply ministerial.

SEC. 21. LIMITATION LAWS. We have, in treating of laws impairing the obligation of contracts, reserved the consideration of retrospective limitation laws, because such laws may come into conflict with other parts of the Constitution as well as with the sacredness of contracts.

Before 1852 the limitation in actions of ejectment was twenty years. No limitation applied to suits in equity, but the plea of "staleness" was sustained in analogy to the law; nor was there any certain limitation for debts by specialty, but its place was taken by the presumption of payment. There was no limitation as to writs of dower.

The Revised Statutes gave limitations for all actions, equitable as well as legal (with certain exceptions as to continuing trusts, etc.), and fixed the time for all actions to recover real estate or on bonds and other specialties at fifteen years; but by its own words the chapter on Limitation applied only to causes that should accrue thereafter.

An act approved February 4, 1858, attempting to make the provisions of that chapter retrospective, having turned out to be unavailable on account of its defective title, the legislature in March, 1862, directed by another and well entitled act that such provisions should now extend to all cases,

⁵ Auditor v. Adams, 13 B. M. 150, quoted elsewhere, and many other cases, the proceeding being considered as of course. Similar claims against

the United States are not generally prosecuted by *mandamus*, but by suit in the Court of Claims.

⁶ Garrard v. Nuttall, 2 Metc. 106.

whether the right accrued before or after the Revised Statutes: "This act shall take effect thirty days from its passage."

In a suit brought in 1863 upon a note due in 1847 (such note being considered a specialty under the Kentucky laws) the court, after referring to some older decisions in which it had denounced short limitations to go into immediate effect as "shocking to the moral sense,"¹ said:

"To require that persons upon whose causes of action there was no limitation should learn that the statute had been enacted, and bring their actions within thirty days, would be unreasonable and oppressive. In our opinion the statute is unconstitutional and void."² No one clause of the Constitution is named which the statute violates.

But a subsequent act for making the limitations named in the Revised Statutes retrospective, approved May 31, 1865, was held valid,³ as it gave a full year's time after its passage in which suits might be brought.

Under the Kentucky view the limitation of time fixed by the statute works as well upon the right as upon the remedy. Hence it has been held that where the time for the remedy has once been barred by lapse of time the legislature can not renew it,⁴ though as long as the right of action exists it may be kept alive by new statutes extending the bar.

In the section on *Exclusive Privileges* it has been shown when a special limitation may be established as to any person or corporation, and when this can not be done.

In an early case, where the legislature had repealed, in January, 1814, the clause of the limitation law exempting persons absent from the State from its operation, and a suit was brought soon enough thereafter to reach a final judgment in the Court of Appeals in June, 1817, it did not strike the court, or, as far as the opinion discloses, even the counsel, that the law was unconstitutional, except as far as it might conflict with the compact with Virginia, and it was sustained.⁵

¹ *Pearce's heirs v. Patton*, 7 B. Mon. 168; *Lewis v. Harbin*, 5 B. Mor. 564.

² *Berry v. Ransdall*, 4 Metc. 292, 296.

³ *Lockhart v. Yeiser*, 2 Bush, 231; *Vandiver v. Hodge*, 4 Bush, 538.

⁴ *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344.

⁵ *Nelson v. Wilson*, 4 Bibb, 561.

Somewhat later the court passed on an act of 1809, which limited to two years thereafter any suits of slaves for freedom which might be brought on rights accruing under certain acts of Pennsylvania and Virginia, which meant simply the enslavement of those who should not sue within two years. Two judges (Mills dissenting) held that no constitutional provision forbade retrospective limitations as to torts, being evidently unwilling to decide that two years would be a reasonable time to give to an obligee whose contract rights must not be impaired by statute.⁶

NOTE.—Mr. Barbour, in his Kentucky Digest, p. 343, quotes *Trimble v. Vaughn*, 6 Bush, 545, as sustaining the validity of a separate limitation law for certain counties most disturbed by the war, different from the law in the rest of the State; but according to the printed opinion the constitutional question was not raised.

SEC. 22. RETROSPECTIVE LAWS. Where a retrospective law is not an *ex post facto* law (see Section 12 *supra*), and does not impair the obligations of contracts, there is nothing said expressly in the Kentucky Constitution to condemn it. We have seen (*supra*, Section 9) that an invalid conveyance, made before the law, can not be validated so as to divest the grantor's property.

Laws enlarging the remedy for contracts, for instance, subjecting lands to execution which were not liable at the date of the contract,¹ and for like reason laws which partially repeal the list of articles exempted from levy, are not objectionable.

A number of retrospective laws in favor of "occupying claimants" were passed between 1797 and 1824, all growing out of the struggle of the people and courts of Kentucky to protect the unfortunate possessors of land under bad titles from the severe construction placed by the Supreme Court

⁶ *Amy v. Smith*, 1 Litt. 830 (1822). The case is of historic interest, as involving the question whether negroes are citizens within the meaning of the U.S. Constitution; Judge Benj. Mills sustains the affirmative as boldly and with almost the same power and

wealth of learning as *JJ. Curtis* and *McLean* did thirty-five years later in the *Dred Scott* case. See Sec. 15, n. 16, for the present doctrine of rights arising from torts.

¹ *Reardon v. Searcy's heirs*, 2 Bibb, 202, overruling to cases in *Pr. Dec.*

(U. S.) on the compact with Virginia, in *Green v. Biddle*.² It is useless to analyze these decisions, as they must in great part be ascribed to a strong popular pressure due to causes that have long been forgotten.

While we have seen that claims to be relieved against torts were at one time considered as being less under constitutional protection than rights arising from contract;³ on the other hand, the right of the individual to have damages for a tort is now considered property, and can not be abolished for the common good.⁴

Retrospective changes in the remedy are still to be considered, not in the mere details of practice;⁵ such are allowable, of course; but substantial changes.

The right was given to married women by the Code of Practice of 1854, Section 579, to open erroneous judgments by a new suit where the coverture did not appear of record. The new Code took this right away from and after January 1, 1877. It was held that a married woman against whom an erroneous judgment had been brought in 1872 could not open it upon the grounds since taken from her by statute.⁶ Still, if her title to the land involved was lost to her by the denial of this remedy, why was not the repeal of her remedy a taking of her property for the public good (the peace of the community) as much as the Amnesty Act of 1867 was an uncompensated taking of the property of those who were trespassed upon during the civil war? It is difficult to draw the line, and it is best to abide by the decisions made on both sides of it.

SEC. 23. CONDITIONAL LAWS. We mean here by "Conditional Laws" those statutes which are not to go into effect till and unless some future event has taken place. This event is generally the approval of the people, either of the whole State or of some county or other division in which the law is to operate. Very soon after the new Constitution went into

² *Supra*, Sec. 6, n. 2. See *Shepherd v. McIntyre*, 5 Dana, 578; also *Fisher v. Cockrell*, 5 Mon. 138, under same class of laws.

³ *Amy v. Smith*, 1 Litt. 880. See

supra, Sec. 21.

⁴ *Terrell v. Rankin*, 2 Bush, 461. See *supra*, Sec. 10.

⁵ See *supra*, Sec. 9, notes 6 and 7.

⁶ *Bagby v. Champ*, 83 Ky. 451.

effect the right of the legislature to make a statute, or a part thereof, to depend upon the approval of the local sentiment, was affirmed in a lengthy opinion of Chief Justice Marshall in a case growing out of a railroad subscription, with its consequent bond issue and tax, which was submitted to the people of Mason County.

He places the propriety of such "submissions" on the ground, among others, of local autonomy; why can not the law leave as well one local question to the people of a town or county as it leaves to a council or other local body elected by the people the bulk of the local government, with all questions involved therein?¹ But he also places the validity of the statute on broader grounds, which ought to be given in his own words:

"The legislative department performs and finishes its office by the mere enactment of the law. It does not of itself carry the law into operation. This is necessarily done by extrinsic agencies. . . . It may be carried into operation by the executive alone. It may be enforced by the judiciary, etc. . . . These are the regular agencies, etc. But the legislature is not restricted to these agencies. It may select or appoint others."²

Twenty-three years later, when the objection was raised to a school tax law submitted to the people of Bracken County, first, that it was submitted at all, the General Assembly thus abdicating its legislative functions; secondly, that negroes were excluded from those to whom the tax law was submitted for approval, and certain women and aliens were included, the court held³ that the approval by the people is not an "election" in the constitutional sense, but only an "agency selected by the legislature," and the above passage is quoted in support of this view. After innumerable submissions had been made of school tax laws (two for the whole State among

¹Slack v. Maysville & L. R. R. Co., 18 B. M. 1, 86 (1852).

²Ibid, p. 22.

³Marshall v. Donavan, 10 Bush, 681, 695. The case of Rogers v. Ja-

cob, on the "Wallace Election Law" for Louisville, might have been disposed of on this ground alone, but was not. See *infra*, Sec. 26.

them), acts authorizing railroad subscriptions, and other local loans and taxes, and the power as to such measures had been fully acquiesced in, the struggle was renewed in opposition to "Local Option."

The first decision of the Court of Appeals on this important topic was rendered by an equally divided court, affirming the judgment below, under an act of May, 1874, which authorizes an "election" upon the licensing or prohibition of the liquor traffic in any city, town, or civil district, on the petition of twenty voters. The decision was not reported, but is referred to in Barbour's Digest, p. 338, 52.⁴ But in the next year we have a unanimous decision of the court sustaining "An act to prohibit the sale of intoxicating liquors in the county of Bullitt," with the proviso that it "shall take effect whenever it shall be ratified by a majority of the voters of said county,"⁵ and this ruling has since been acquiesced in as the settled law of the State.⁶ This doctrine is in agreement with the rulings in most, though by no means all of the States. In Indiana all acts depending upon local assent are held void.⁷

The doctrine has been carried to its fullest consequences; a legislative charter of a bridge company, granted in 1846, which was made to depend upon the assent of the State of Ohio, and having received that assent, was held good notwithstanding the objection on Federal grounds that the conditional charter by one State and the assent of the other constitute a "compact between the States" within the prohibitory words of the Constitution of the United States.⁸

SEC. 24. MISCELLANEOUS TOPICS. We defer some of the bearings of the Constitution to the two following chapters, and we omit all detailed discussion of its bearings on criminal prosecutions, as lying outside of the scope of this work. A few subjects remain to be considered, highly important in themselves, but of minor interest to the lawyer.

⁴ Anderson v. Commonwealth, MS. Op. (1877).

⁵ Com'nwealth v. Weller, 14 Bush, 218.

⁶ Burnside v. Lincoln Co. Court, 86 Ky. 421, 427; a local option case.

⁷ Maize v. The State, 4 Ind. 848.

⁸ City of Covington v. C. & C. Bridge Co., 78, 79.

1. *Religious Equality.* The Bill of Rights, in Section 6, declares :

“That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion.”

The Civil Code of Practice allows those who are conscientiously opposed to taking an oath, to affirm; the Code of Practice in criminal cases contains no such provision. This in itself seems to us a violation of the above section, but no difficulty seems to have thus far arisen by the omission. But can a person not having the religious belief, which gives a meaning to an oath, be allowed to take it? At common law he could not, but the above clause of the Constitution (the Court of Appeals says) has changed the common law rule; and an unbeliever is not only allowed to testify, but there must be no inquiry into the belief of a witness, with a view to affect his credibility.¹

The ordinary clause, about the right of all men to worship according to the dictates of their own conscience, etc., has been carried out by a clause in the Sunday law, exempting from its penalties those who observe another day of the week as their Sabbath, and such persons are allowed to carry on their business publicly on the Sunday.²

The article “Concerning the Militia” contains this clause, taken in substance from the Constitution of 1799: “Those who belong to religious societies whose tenets forbid them to carry arms shall not be compelled to do so, but shall pay an equivalent for personal service.”³

It was held, under the former Constitution, that the persons thus exempted are not a part of the militia; that a court-martial has no jurisdiction to fine them for non-attendance at drill; that such fines can not be imposed as the equivalent of personal service, but the legislature must ascertain the equivalent by law.⁴

The militia, other than “State Guard” (*i. e.*, uniformed

¹ Bush v. The Commonwealth, 80 Ky. 244, 251. Sec. 10.

³ Art. VII, Sec. 1.

² Gen. Stat., Chap. 29, Art. XVII,

⁴ White v. McBride, 4 Bibb, 61.

companies of volunteers) has fallen into such utter disuse that this clause has no longer any value.

2. *Common Schools.* The Constitution demands that the Common School Fund (arising in the main from the distribution of the Federal surplus in 1836 and 1837) and all taxes levied thereafter for common school purposes "be appropriated in aid of common schools, but for no other purpose." Any part of the interest or of the tax levy that is not used in aid of common schools must be invested under the orders of the legislature; each county is credited with its proportion of the yearly income, and what is "not called for for common school purposes" shall be re-invested for the benefit of the county.⁵

It has been held that the legislature can not abdicate its control over any part of the fund; it can no more turn the re-investments made for the benefit of any county over to the authorities of that county, than the principal fund; but those put by the law in charge of the State system must see to it that the money is applied to common schools:⁶ it has also been held that no part of the fund can be given by special law to the principal of a private school who is not employed as a teacher under the State system, though he may allow all children of school age to attend free of charge, for a school not established as part of the system and in pursuance of the school law is not a common school;⁷ and it has been held, lastly, that the money of the common school fund can not be used for the purpose of buying for each school district, or out of taxes raised by it for common schools, a "History of Kentucky" or other books, and, by way of argument, the court added, the fund can not be used for establishing normal schools or teachers' institutes; which is certainly a very nar-

⁵ Art. XI, Sec. 1.

⁶ *The Auditor v. Holland*, 14 Bush, 147.

⁷ *Halbert v. Sparks*, 9 Bush, 259. But a graded school in which branches are taught above the curriculum established by the State, as long as it

is free to all children of lawful age, is a common school, and may, if under control of public officers, have its share of the school fund: *Williamstown Graded Free School District v. Webb*, 11 Ky. L. R. 456 (to be reported).

row construction.⁸ The question about reading the Bible in the public schools has never been raised in a Kentucky court.

3. *The Sinking Fund.* The legislature has no power to diminish its resources, before the whole State debt is paid.⁹ Among these resources are certain works of internal improvement.¹⁰ The dealings of the legislature with these improvements, in the way of lease or sale, can not be inquired into by the courts on the score of being bad bargains, as the law-making power alone can judge of matters of expediency.¹¹

And though any profits to be made on the penitentiary had by a law enacted before 1850 been set aside as part of the Sinking Fund, yet it was held that the legislature "is under no constitutional obligation to attempt to make profit in its management, nor to adhere to contracts from which profits would likely be realized when a *sense of justice to the lessee*" or good policy might require them to be modified or canceled.¹² Hence a legislative release of the lessee from an onerous contract was sustained.

4. *Navigable Waters.* The legislature has the same power over navigable waters within the State, as over highways on land. Hence, when the State had improved the Green and Barren Rivers, and had from business considerations leased the improvements to a joint stock company with power to charge tolls, the act giving the lease was valid, and its repeal without the company's consent a breach of contract, and as such, void.¹³

5. *Delegations of Power.* While the Kentucky courts have been as liberal as any in sustaining the delegations of

⁸ Collins v. Henderson, 11 Bush, 74, 89. A State Normal School for colored teachers was established by act of May 18, 1886; its cost comes from the treasury out of the general fund. In Louisville the expenses of the City Normal School are paid without objection from the City school fund, which arises mainly from the City school tax.

⁹ Art. II, Sec. 34.

¹⁰ The acts on this subject are found

mainly in Loughb. Stat., pp. 283-351, beginning with an act of February 28, 1835.

¹¹ Simpson Co. Court v. Arnold, 7 Bush, 353; McReynolds v. Smallhouse, 8 Bush, 447.

¹² Commonwealth v. Todd, 9 Bush, 708, 713.

¹³ Commissioners of Sinking Fund v. Barren & Green Riv. Nav. Co., 79 Ky. 73.

legislative power to municipal bodies, they will not allow the liberty of the citizen to be abridged by powers entrusted to a private corporation. Thus, a water company can not be authorized to grant or withhold license from plumbers, and thus to deprive men of the liberty to exercise their calling.¹⁴

6. *The Liberty of the Press.* No case of criminal libel has come before the Kentucky Court of Appeals; nor any civil suit for libel growing out political disputes. Hence the guarantees of a free press, which the Constitution of Kentucky has in common with those of other States, have never been construed by authority.

SEC. 25. GENERAL PRINCIPLES. All constitutional limitations are governed alike by some general rules centering in the one maxim that the statute law must stand good as far as it can. These rules are found in Cooley and other textbooks, as embodying general American jurisprudence, but they have taken in Kentucky a somewhat peculiar turn.

1. *No one can complain of a law being unconstitutional unless his rights are invaded, nor then if he has asked for the passage of the law.* This will be fully illustrated in a chapter on the Bearing of the Constitution on Taxation.

A white man indicted by a grand jury from which negroes were excluded can not object to his sentence on such a ground.¹

The purchaser at a chancery sale, which was made subject to redemption under an act of 1878, for a debt of older date, in violation of the creditor's constitutional rights, is bound by his purchase and its terms, if the creditor does not object.²

An applicant for a bar-room license, who would not under such license be apt to sell for medicinal or sacramental purposes, can not complain of the local option law under which the license is withheld, because it does not exempt such sales from its prohibitions.³

¹⁴ *Franke v. Paducah Water Co.*, 11 Ky. Law Rep'r, 17. The statute hardly authorized the by-law of the Water Co.; but the court went further, by saying that constitutionally no such by-law could be authorized.

¹ *Commonwealth v. Wright*, 79 Ky. 22.

² *Sullivan v. Berry's adm's*, 83 Ky. 198.

³ *Commonwealth v. Wright*, 79 Ky. 22.

2. *Though part of an act be unconstitutional, so much of the rest as can stand by itself will be enforced.* Thus, where a law imposed a fine of \$1,000 for certain fraudulent practices to be recovered by civil suit, and in case of non-payment the defendant was to be imprisoned for not less than six months in the discretion of the court, the latter clause might be struck out as unconstitutional, but the money judgment should be rendered.⁴

The rule is thus stated in another recent case :

“The two parts of the section are not essentially connected ; and as the first part is complete in itself, the latter may, according to an accepted rule of construction, be severed and stricken out without invalidating the rest of the section.”⁵

The readiest illustration is that of a multifarious act, only in part covered by its title ; see *supra*, Section 13. Another is that of laws impairing the remedies for the enforcement of contracts, which are void as to antecedent, but valid as to subsequent contracts.

3. *A law must not be so construed as to render it unconstitutional, if a construction can be given it that will sustain it.*

This principle is illustrated, but not announced, in *City of Covington v. McNickle's heirs*,⁶ where an act apparently authorizing the city of Covington to close up, in the discretion of its council, any one of its streets, was construed to apply only to a certain street named in the act ; as construed in its wider scope, the act appeared to the court to be unconstitutional. The act of 1820, prohibiting sales of mortgaged property, under a power in the mortgage or deed of trust, without a decree of court, was construed as being meant to be prospective only, as otherwise it would be unconstitutional.⁷ In these cases a different construction of the law would have led to the same result, rendering it void instead of simply inapplicable.

The rule was not well observed in a late tax case, where a provision in a city charter amendment, that certain city books

⁴ Commonwealth v. Shuman, 85 Ky. 686. 696.
Ky. 686.

⁶ 18 B. M. 262.

⁷ Commonwealth v. McClellan, 83

⁷ Head v. Ward, 1 J. J. Mar. 283.

should be "evidence," was construed as making them "conclusive evidence," and as thus depriving the defendant of his right to be tried by the law of the land.⁸

4. *A statute will not be declared unconstitutional, unless it is so clearly : it can not be disregarded on a mere doubt.*

This statement has been made in a great number of cases. It was thus expressed in 1874 :

"We recognize to its fullest extent the rule that all doubts existing in the mind of the court as to the constitutionality of an act of the legislature must be resolved in favor of its validity."

This, however, is more than offset by the rest of the sentence :

"But we do not understand this rule to require that words must be found in the Constitution which in express terms prohibit the passage of an act claimed to be in conflict with the organic law."⁹

5. *A court will not pass on a constitutional question, if the case can be disposed of on other grounds.* This was fully illustrated in *Covington v. M'Nickle's heirs*, already quoted under Rule 3, and has been followed in many other cases. Of course Kentucky judges have their weaknesses, in the way of ambition, like other men, and occasionally violate this rule in order to make their power felt.

6. *Where the Constitution limits the law-making power, it does not thereby repeal former laws going beyond the limit ; where it demands new laws to carry out a policy, it does not operate without the aid of statute.*

This rule was of great importance immediately after the present Constitution went into effect ; it has by the great lapse of time lost interest, but it will again come to the

⁸ *City of Louisville v. Cochran*, 82 Ky. 15, 30.

⁹ *Collins v. Henderson*, 11 Bush, 74, 81. This was a mandamus to compel the Superintendent of Public Schools of the State to buy, out of the school fund, the appellant's His-

tory of Kentucky under a special act to that effect. The law was held unconstitutional under the guarantee of the school fund against diversion. Art. XI, Sec. 1, of the Constitution.

forefront as soon as the new Constitution shall be adopted. See authorities in note.¹⁰

7. The construction given to words of like import in an older Constitution must be put upon that in force now.

This was applied to the clause which confers the pardoning power on the Governor. By usage, under the old constitution, this was understood to extend to pardons before as well as after conviction, but had never been passed upon by the Court of Appeals. It was held that the use of the same words in the new constitution was an approval of the usage under the old one.¹¹

¹⁰Slack v. M. & L. R. R. Co., 13 Bush, 1 (was mainly decided on other grounds, but holds also that the provisions of the Constitution of 1850 were not yet applicable to the loan previously authorized); Jackson v. Collins, 16 B. M. 218. (The Consti-

tution required the legislature to hamper emancipation of slaves by a law requiring their removal from the State; held, not to affect emancipation till such laws were passed.)

¹¹Commonwealth v. Bush, 2 Duvall, 265.

CHAPTER IV.

THE CONSTITUTION AS BEARING ON THE MACHINERY OF THE STATE.

SEC. 26. Elections.

SEC. 27. Framework of the Courts.

SEC. 28. The County Court.

SEC. 29. Judicial Tenure of Office.

SEC. 30. Direct Bearing of the Constitution on Offices.

SEC. 31. Power of Legislature over Offices.

SEC. 32. Official Emoluments.

NOTE.—Much of this chapter may become obsolete by the expected new Constitution.

SECTION 26. ELECTIONS. The Constitution (Article VIII, Section 15) directs:

“In all elections by the people, and also by the Senate and House of Representatives, jointly or separately, the votes shall be personally and publicly given *viva voce*,” which is made more emphatic by the proviso “that dumb persons may vote by ballot.”

But Article VI, Section 6, says:

“Officers for towns and cities shall be elected for such terms and *in such manner* and with such qualifications as may be prescribed by law.”

As the special must prevail over the general rule, it has been held, that the charter of a city may authorize the votes at municipal elections to be given by ballot,¹ and such elections

¹ *Rogers v. Jacob*, 11 Ky. Law Rep. 45 (1889). The question was hardly before the court. The validity of a loan ordinance submitted to the people under the Australian system (the Wallace Law) was in question, and under the previous decision

of the court in *Marshall v. Donovan* (10 Bush), such a vote is not an “election” in the sense of the Constitution. What the court says further, that the law in compelling illiterates to vote in a compartment without assistance, violates the guarantee

need not be held within the hours (6 A. M. to 7 P. M.) prescribed by the Constitution (Article VIII, Section 16) for all elections by the people.

But under Article XIII, Section 7, requiring "That all elections shall be free and equal," it was said in the same case that the clause in the election law for Louisville, which compelled all voters—unless blind—to mark their ballots within a closed booth without assistance, was objectionable, as it placed illiterate men under an inequality as compared with others. (But are not illiterate men always under a disadvantage, either when receiving a printed ballot from their supposed friends, or when voting *viva voce* a long ticket, the names on which they can not remember?)

While the qualification of voters in all other elections is fixed by the Constitution (Article II, Section 8), and comprises every free white male citizen twenty-one years old, who has resided in the State two years, or in the county, town, or city in which he offers to vote, one year next preceding the election, and sixty days in the election precinct: the legislature may prescribe other qualifications for those voting for city or town officers, for instance, the previous payment of all taxes, or of a poll tax.² And the judge of a city or police court, though exercising the powers of a justice of the peace within the town, is considered a town officer for this purpose. The voting on a loan or tax is not an election (see *infra*).

The words "free white" were stricken out by the Fifteenth Amendment. The residence in State, county, or city, need not follow after the obtention of citizenship; but a foreigner who has had such residence while an alien, becomes a voter as soon as naturalized.³

Though the qualifications of voters for State and county officers can neither be restricted nor relaxed by law, the legislature may secure the purity of elections by a registration law, and those who have not registered in time, after having all reasonable opportunities, may be debarred alto-

"that all elections must be free and equal," is *obiter dictum*; for notwithstanding this supposed defect, the

court sustained the result of the vote.

² Gordon v. Buckner, 81 Ky. 665.

³ Morgan v. Dudley, 18 B. M. 724.

gether from casting their votes; and such registration law may be made to apply to one city only, if the legislature think fit to thus restrict its application;⁴ it does not on that account hinder the election from being "free and equal," but may tend to make it more so by excluding fraudulent votes.

Should the person receiving the highest number of votes be ineligible (f. i. a candidate for county clerk who has not the certificate of qualification) the next highest number of votes confers no right to the office. This ruling, rendered in 1855, was rested on the provisions of the Revised Statutes (chapter Elections, Article VII, Sections 1, 8), but that provision had force only as being the true construction of the Constitution.⁵ We have seen, in Section 22, that the assent or disapproval of the people to the provisions of a legislative act submitted to them is not an election in the sense of the Constitution;⁶ and the legislature may ascertain such assent in any way it chooses.

SEC. 27. FRAMEWORK OF THE COURTS. Under Article V, Sections 16–28, of the Constitution, the Circuit Court is the court of unlimited ordinary jurisdiction. The number of circuits is limited by Section 24 (not more than sixteen till the population is 1,500,000, and only one to be added in each four years), and under Section 19 no county can be divided in making circuits. Hence the legislature has sought relief in creating courts with different names, possessing a greater or lesser part of the jurisdiction of the Circuit Court, following the example that had been set in 1835, when the Louisville

⁴ *Commonwealth v. McClelland*, 83 Ky. 686. The legislative power is rested mainly on Art VIII, Sec. 4, of the Constitution, which says: "Laws shall be made to exclude from office and from suffrage those who shall hereafter be *convicted* of bribery, perjury, or other crimes or high misdemeanor" (Such laws have been made as against professional gamblers, but not as against bribers.) "The privilege of free suffrage shall be supported by laws regulating elec-

tions, and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult or other improper practices."

⁵ *Slevins v. Wyatt*, 16 B. Mon. 542. Also, *Atchison v. Lucas*, 83 Ky. 451.

⁶ See also *infra*, Sec. 35, under the head of *Taxation, Local Assent*. See *Hall v. Marshall*, 80 Ky. 552–558; a vote on changing the county seat, when the assessor's list was made, by the act, the test for qualifying voters held good.

Chancery Court was established to try all chancery suits in Jefferson County. This is done under the recognition (in Article IV, Section 2) of "such courts, inferior to the Supreme Court, as the General Assembly may from time to time erect and establish." These new courts have always been recognized as holding, by constitutional warrant, the powers conferred upon them. There is now a Louisville Chancery Court, a Louisville Law and Equity Court, and Jefferson Court of Common Pleas, leaving to the Jefferson Circuit Court only criminal jurisdiction; and there are Chancery, Common Pleas, and Criminal Courts in other parts of the State. To all of these the general provisions of the Constitution as to Circuit Courts and Circuit Judges have been extended by construction. Thus Section 28, which says, "The General Assembly shall provide by law for holding Circuit Courts when, from any cause, the Judge shall fail to attend, or . . . can not properly preside," is applicable to the Louisville Chancery Court; and a law which provides for a special judge for that court, to be elected by the attorneys in attendance, is valid, as "we can hardly suppose the convention attached more importance to the name than to the jurisdiction of the court."¹

The Court of Appeals, composed of four judges, who are elected for eight years, by separate districts, and at intervals of two years, has only appellate jurisdiction (with the slight exception of its power to try and remove Clerks of Court for "good cause shown.") (Article IV, Section 39.) But "the grant of appellate jurisdiction implies the grant of all powers necessary to its proper and complete exercise." Hence the court may upon motion render judgment against a sheriff who fails to return an execution for costs from that court.²

In 1882 the legislature established a "Superior Court" of three judges, elected in three districts for four years, as a temporary commission to try appeals in less important cases, that is, in any case that do not involve: (1) The validity of a statute; (2) title to a freehold or franchise; (3) felony; (4) pro-

¹ *Rudd v. Woolfolk*, 4 Bush, 555, 560.

² *Mitcheson's adm'r v. Foster, etc.*, 3 Metc. 324.

bate of a will ; (5) money or personalty above \$3,000, exclusive of interest and costs ; which law, passed at first for four years only, was extended in 1886 for four years longer. The judgment of the Superior Court may in a few cases be further appealed to the Court of Appeals. The establishment of this intermediate court has been approved by the Court of Appeals, not being in conflict with Section 2 of Article IV of the Constitution, which says that the appellate jurisdiction of the Court of Appeals shall be co-extensive with the State.

SEC. 28. THE COUNTY COURT. The County Court of Kentucky is a lineal descendant, through the County Court of Virginia, of the English Quarter Sessions, but has been greatly modified by the Constitution of 1850. Before 1850 it was, under all circumstances, composed of all the magistrates of the county, and united in itself judicial, financial, and executive powers ; for it laid the county levy, ordered all county work, and audited the cost thereof, and appointed or at least nominated all county officers. But now a presiding judge is provided by Section 29 of Article IV of the Constitution,¹ who is elected by the whole county, while the justices of the peace are elected in precincts or districts, two in each. The judicial power of the court is now vested entirely in the presiding judge ; but, under Section 37 of Article IV, the law directs the justices of the peace to “ sit at the Court of Claims and assist in laying the county levy and making appropriations only.” The school law of 1870 vested the election of the county school commissioner in “ the presiding judge and justices of the peace of each county, at the Court of Claims ;” and this provision was sustained on the simple ground, that the office not being known to the Constitution, the law-maker might “ prescribe how the common school commissioners should be chosen ; either by all the legal voters, or by the patrons of the common schools, or by the County Court judges and justices, etc., at such times and places as it might prescribe.”²

As Section 33 of the article on Judiciary reserves to the

¹ Also two associate judges, whom the legislature might abolish, and very soon did abolish.

² Johnson v. DeHart, 9 Bush, 640, 643.

County Court, until changed by law, its former jurisdiction, it has been held that it may still unite some administrative with its judicial functions, and that the assessment of taxes may therefore be confided to the County Judge. "Its powers being of a mixed character, it is sometimes difficult to tell upon which side of the often shadowy line its acts should be ranged."³

The executive powers of the County Court are much abridged by the elective principle which now prevails; yet the Presiding Judges have by a number of statutes, mainly local, been given a pretty extensive patronage, and no constitutional objection has been raised to the appointments made by them.

The judicial powers of the County Court refer mainly to the probate of wills, appointment of administrators, executors, and guardians, and the approval of their bonds and accounts; laying out of roads; partition and allotment of dower, etc.

The justices of the peace, who for non-judicial purposes are a constituent part of the County Court, have, while sitting separately, or two together, both civil and criminal jurisdiction, which is not defined in the Constitution, beyond a provision that it "shall be co-extensive with the county,"⁴ leaving it to be understood that it shall embrace the cognizance of small civil suits, summary process for minor offenses, and the examination of criminals, with a view to bail or commitment, just as it did under the older Constitutions. The jurisdiction being co-extensive with the county, does not interfere with a law which authorizes the defendant sued before a justice (or magistrate) from "claiming" his district; for the law may give the choice of the district as properly to the defendant as to the plaintiff. The justices at Louisville have, however, most persistently disobeyed, on pretense of constitutional grounds, the law enabling the defendant to claim a trial in his own district.

SEC. 29. JUDICIAL TENURE OF OFFICE. The term of the

³ Baldwin v. Shine, Presiding Judge, 84 Ky. 502, 514. The powers of the Levy Court, such as that of ordering bridges to be built, are min-

isterial, not judicial. Anderson Co. Ct. v. Stone & Son, 18 B. M. 818, 852.

⁴ Art. IV, Sec. 34.

various judges is plainly fixed by the Constitution; those of the Court of Appeals eight years, Circuit Courts six, County Court four; and a term of six years is always prescribed for the judges on whom a part (civil or criminal, law or equity) of the Circuit Court is conferred. Difficulty arises only in the case of appointments or elections to fill vacancies.

If a vacancy occurs among the judges of the Court of Appeals, the Governor issues a writ of election to the proper district to fill the vacancy; "*provided*, that if the unexpired term be less than one year, the Governor shall appoint a judge to fill such vacancy." (Article IV, Section 7.) As another section (Article III, Section 9) gives to the Governor "power to fill vacancies that may occur, by granting commissions which shall expire when such vacancies shall have been filled according to the provisions of the Constitution," the question arose, whether, upon the death of an Appellate Judge who had more than one year to serve, the Governor might not fill the vacancy at once, his incumbent to serve only till an election was held and its result ascertained; but the three remaining judges certified their opinion to the Chief Executive, that he could only order an election, and that the seat must in the mean time remain vacant.¹

The judges of equal rank with those named in the Constitution must have the same qualifications (f. i. eight years standing at the bar), and gain and hold office by the same means and tenure.² A statute establishing such a court must make the judge elective. Vacancies in a Circuit Court must be filled according to the same rule, as those arising in the Court of Appeals; for Section 26, which refers to the former, reads exactly like Section 7 of the same article, which refers to the latter; and the legislature can not empower the Governor to fill a vacancy of more than one year. But where the vacancy happens, not in a Circuit Court, but in a court "carved out of the Circuit Court," the section (Article III, Section 9), already quoted, comes into play, and though

¹ Power of the Governor to fill vacancies by appointment, 79 Ky. 621. (July, 1881.)

² Toney v. Harris, 85 Ky. 453, 475; referring to Rudd v. Woolfolk, *ubi supra*.

more than a year of the term is unexpired, the Governor may appoint a judge *pro tempore*; but not for a longer time than what is in his opinion required for ordering a new election, and to await its result. The judge so appointed, though the call of a new election be improperly delayed, "should be held and regarded as judge *de jure* until his successor is elected and qualified."³ Of course, without the Governor's proclamation no valid election can be held to fill the vacancy, not even at the general State election; and if held, the choice there made would amount to nothing.⁴

The guarantees of judicial salaries against abridgment will be discussed under the head of "Official Emoluments."

SEC. 30. DIRECT BEARING OF THE CONSTITUTION ON OFFICES. By its own vigor and without the aid of statutory law, the Constitution in many ways operates to disqualify for office, or to vacate an official position.

The members of the General Assembly must, at the time of the *election*, be citizens of the United States; and Representatives must also be twenty-four years old, and have resided two years in the State, and the last year in the county, town or city for which they are chosen; the age for Senators is thirty, residence in the State six years; the last year in the district.¹ It seems that where a city is divided into more than one Representative district, no length of residence in the particular district is required. No one can be elected while acting as clergyman, nor while he "holds or exercises" any office of profit under the State or Federal Government, except attorneys not receiving a salary from the Government, justices of the peace and militia officers;² and no person who has been a collector, or assistant or deputy collector for the Commonwealth, until the end of six months after receiving his *quietus*.³ A Commissioner of the United States Court was excluded from the House of Representatives in 1888, he having tendered his resignation before the day of election; but the resignation had not been accepted; yet Masters in Chancery were thought not

³ *Ibid.*

² Art. II, Sec. 27.

⁴ *Ibid.*

³ Art. III, Sec. 23.

¹ Art. II, Secs. 4, 16.

to come within the disqualification. As the Houses judge of the qualifications of their own members, decisions on these points are not to be met with in the reports. The same points might have been decided otherwise by the Court of Appeals.

The Governor, when elected, must be a citizen of the United States, thirty-five years of age, and for six years a citizen of the State, and is not eligible for the next term.⁴ A Judge of the Court of Appeals must be a citizen of the United States, have resided two years in the district by which he is elected, be thirty years old, and of eight years' standing at the bar, or bar and "bench of any court of record" combined.⁵ The same qualifications hold good for a Circuit Judge.⁶

The ordinary qualifications for other officers named in the Constitution (aside from the anti-dueling test) are:

(1) Citizenship of the United States; (2) full age, while Commonwealth's Attorneys, Surveyors, Coroners, Jailers, and Assessors must be twenty-four years old; (3) not being a "member of Congress, nor person holding any office of trust or profit under the United States or either of them, or under any foreign power" (which applies also to members of the General Assembly); (4) residence in the district or county for one year, and (except as to County Judges) two years in the State.⁷ Town and city officers, except "trustees of towns," must also

⁴ Art. III, Secs. 8, 4.

⁵ Art. IV, Sec. 12. That a candidate, though nominally a lawyer for eight years, had spent several years as a soldier in the civil war was considered no objection; and the man whose "eight years' standing" was thus only nominal proved himself a very able judge.

⁶ Art. IV, Sec. 22. A few years ago the question whether a certain Judge of high rank had or had not been elected Circuit Judge, after a little less than eight years from the date of his law license, caused a deep stir among the lawyers and people of Kentucky.

⁷ Art. IV, Sec. 3; VI, Sec. 2; VIII, Secs. 11, 18. In small towns the governing body is known as "Board of Trustees," and consists at first, at least, of the most considerable landholders of the neighboring country. In fact, "trustees of towns" were originally not so much a governing body, as real trustees of the lands on which the town was laid out, empowered to sell them in lots. When the town grows into a city, the "trustees" are exchanged for councilmen, who must reside within the city. By statute elected trustees must now be citizens of the town.

reside in the city or town for and by which they are elected; and this rule of residence holds, not only as to the time of the election, but as to the whole term. The legislature has in all city charters further carried out the constitutional idea of home rule, by requiring all aldermen, councilmen, or school trustees, that are chosen by wards, to reside in the ward; and the resignations, by reason of removal from the ward, of such local legislators are of almost daily occurrence.

In the case of "county or district officers" the Constitution carries this idea to its furthest limit; for they are made to "vacate their offices by removal from the district or county in which they shall be appointed,"⁸ which last word includes "elected." And as this loss of office is not deemed a punishment, but the foreseen result of the officer's voluntary action, the vacancy arises without previous adjudication, and may at once be filled by the appointing power. But the removal must amount to a change of domicile; if the officer removes with his family for some temporary business or pleasure, no vacancy arises.⁹ In an early case a section of the Revised Statutes was quoted, to show incidentally that a sheriff loses his office by removing from the county; but it seems clear (see decisions quoted in Section 18) that the Statute can neither enlarge nor diminish his rights under the Constitution. It was held in the same case that the certificate of election furnishes no proof of eligibility; this is always open to proof *aliunde*.¹⁰

As a person holding or exercising a Federal office can not "hold or exercise" any office under the Commonwealth, the acceptance of a Federal commission, or acting under it, must *ipso facto* vacate a State office.¹¹

From the Clerks of the Court of Appeals, Circuit and County Court, a certificate of fitness, granted by a Judge upon examination before him, is also required, without which certificate they would not be eligible. (Constitution, Article IV, Section 12, and VI, Section 2.)

⁸ Art. VIII, Sec. 11.

⁹ Curry v. Stewart, 8 Bush, 560.

¹⁰ Patterson v. Miller, 2 Metc. 493.

¹¹ See Rodman v. Harcourt, 4 B. M.

224, 226 (of two incompatible offices under different governments the second by acceptance vacates the first); Hoglan v. Carpenter, 4 Bush. 89.

To these qualifications demanded by the Constitution, the Court of Appeals has rather ungallantly added another, viz., that none but men are eligible to constitutional offices; thus a woman is not eligible to the office of jailer.¹² The reasoning of the court will appear to the reader forcible or faulty, according to his or her feelings on the subject. The Constitution thus construed was formed in 1850, when the cause of woman's rights was not as far advanced as now; but under the old Constitution it was not very rare for women to succeed their husbands in some ministerial office, and to perform its duties for many years; though the matter was never judicially tested.

In the same case a very important rule was reaffirmed: Though the candidate receiving the highest vote for jailer was as a woman ineligible, the candidate with the next highest vote gained no right to the office.¹³ The Kentucky House of Representatives, under partisan pressure, has since violated this just rule by admitting the next highest candidate where the highest was disqualified.

But the legislature may admit women to those offices which it creates, and which are not named in the Constitution;¹⁴ there are a number of female notaries in the State, and there was a female State Librarian. By common consent, the qualifications of age and length of residence are never insisted on in the case of deputies; and probably that of sex does not apply, as the Constitution does not require the appointment of deputies, though recognizing in one passage¹⁵ the common law rule that an office may be exercised by deputy.

All disqualifications arising from want of proper age or sex, citizenship, or residence, or a conflicting office, not being in the nature of a punishment, may be inquired into collaterally. Not so, as to disqualification arising from the anti-dueling clauses of the Constitution.

An oath of office is prescribed for the members of the General Assembly and for *all officers* (which includes those of cities and towns¹⁶) and for all members of the bar, which be-

¹² *Atchison v. Lucas*, 83 Kentucky, 461.

¹³ *Ibid.* p. 467.

¹⁴ *Ibid.* p. 466.

¹⁵ Art. II, Sec. 28.

¹⁶ *Curry v. Stewart*, 8 Bush, 560.

side the usual parts of such an oath, embraces this asseveration: "that since the adoption of the present Constitution, I being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it with a citizen of this State; nor have I sent or accepted a challenge to fight a duel with deadly weapons with a citizen of this State; nor have I acted as second in carrying a challenge, or aided or assisted any person thus offending."¹⁷

By another section (Article VIII, Section 20) any one convicted of giving, sending, accepting, or carrying a challenge to fight a duel "with a citizen of this State" is to be deprived of the right to hold office. We have already seen (Section 10) that one who takes the official oath with its exculpatory clause can not be ejected from office, except on formal conviction.¹⁸ And such conviction would carry disfranchisement, though the offender at the date of his offense was not a citizen of Kentucky.¹⁹

These provisions of the Constitution do not abridge the power of the legislature to direct the punishment of dueling, sending, carrying or accepting challenges with persons not citizens of Kentucky.²⁰

By another section the Governor is empowered to pardon a duelist "after five years from the time of the offense," and to restore him to all rights; in which case the oath of office may be modified to suit his case.²¹

SEC. 31. POWER OF LEGISLATURE OVER OFFICES. While the legislature can not displace any one from an office created by the Constitution, it may deal freely with the offices created by itself, and it can, by abolishing the position, oust the incumbent. And as the officer can resign when he will, he can not claim his appointment for a term as a contract of employment by the State.¹

¹⁷ Art. VIII, Sec. 1. It looks as if it was intended not to put Kentuckians at a disadvantage when away from home.

¹⁸ Commonwealth v. Jones, 10 Bush, 725.

¹⁹ Moody v. Commonwealth, 4 Metc. 1.

²⁰ *Ibid.*

²¹ Art. VIII, Sec. 21.

¹ Standeford v. Wingate, 2 Duvall, 440.

The tenure of one who holds a constitutional office rests not on contract, but on the particular words of the Constitution as to the length of his term, and the method of removal. These words address themselves directly to the citizen and to the courts: they need no legislative construction and can not be enlarged by it.

All civil officers may be removed by impeachment;² clerks of courts are also removable by the Court of Appeals for good cause shown;³ county judges, justices, sheriffs, coroners, surveyors, jailers, county assessors, county attorneys, and constables may be removed by conviction on an indictment "for malfeasance and misfeasance in office or willful neglect in the discharge of their official duties."⁴ An indictment, charging a jailer with keeping the jail in such a filthy condition as to endanger the lives of his prisoners, was held good under this provision.⁴ But an act of the legislature, which made the drunkenness of any such officer while on duty malfeasance *per se* and ground for amotion by the sentence of the court trying the charge, was held unauthorized,⁵ while the power of the legislature to punish such drunkenness otherwise was admitted. The power to suspend permanently is a power to remove, and can not be conferred on the County Court as to any of the above functionaries.⁶

The General Assembly may by law direct how "*securities* for public officers may be relieved or discharged;" while another section of the Constitution requires "clerks, sheriffs, surveyors, coroners, constables, and jailers," and such other officers as the law directs, to give such bond and security as shall be prescribed by law. A statute authorizing the County Court to require from these officers additional bond, on the demand of the former sureties, and to remove the officer on his failure to furnish such bond, was sustained.⁷ Such a de-

² Constitution, Art. V.

³ Art. IV, Sec. 39.

⁴ Art. IV, Sec. 36. *McBride v. Commonwealth*, 4 Bush, 881.

⁵ *Commonwealth v. Williams*, 79 Ky. 42.

⁶ *Lowe v. Commonwealth*. But, as

the lower court had not included amotion in its sentence, the Court of Appeals could not add it. The conviction and sentence of fine alone did not carry amotion with them.

⁷ Art. VIII, Sec. 19; VI, Sec. 9. *Bartley v. Fraine*, 4 Bush, 375.

fault is not to be compared to malfeasance in office, and the decisions under that head do not apply to it.

Where the Constitution indicates how an office shall be acquired, the legislature can not by statute extend the term of an incumbent ; for reasons given below.

The officers of towns and cities must be "elected," which means, either chosen by the people of the town or city, or by some plural body of men deriving power from these people by election.⁸ Appointment by the Governor or by a Judge is not an "election." And they must be elected for a term, that is, a time fixed by law : not *during any one's pleasure* : though provision may be made for removal. And it would seem, that as in the case of another clause of the Constitution, which contemplates "terms" of office fixed by law, town and city officers could not be allowed to hold over till their successors are chosen and qualified.⁹

However, a law for the election of Police Commissioners by the whole county of Jefferson, with power to elect policemen for Louisville and the rest of the county, the city of Louisville to pay the salary of the commissioners, has been sustained.¹⁰

An election by the General Assembly is not contemplated by the above clause. Hence city or town officers can not be named in an act ; and a law that retains the old trustees or councilmen in power beyond the term for which they have been chosen is virtually a reappointment, and standing by itself is void. But, where the amendment of a town charter with such a provision is by its own direction submitted to the towns-people for acceptance, their vote in the affirmative is deemed a re-election of the old trustees, and gives them a good title.¹¹

Why was not this point raised when President Johnson was impeached for disregarding the retrospective features of

⁸ Art. VI, Sec. 6. *Speed & Worthington v. Crawford*, 8 Metc. 207 ; *Police Com'rs v. City of Louisville*, 8 Bush, 597, 602. "Of course, to make an election by an organized body le-

gal, its own existence must be legal."

⁹ Art. V, Sec. 41 ; see *infra*.

¹⁰ *Police Com'rs v. City of Louisville*, 8 Bush, 597.

¹¹ *Clark v. Rogers*, 81 Ky. 48.

the Tenure-of-Office act? That act was virtually a reappointment of all presidential office holders for the additional term, between the determination of the President's pleasure and the appointment of a successor with the advice and consent of the Senate; and the act, being passed over the veto, was the action of the two Houses alone, who under the Constitution can not be vested with any part of the appointing power.

A city treasurer, being a mere custodian, and exerting no part of the sovereign power, may be *selected* without reference to the constitutional rule; f. i. the law may delegate the powers of fixing his term to the council.¹² But a city tax collector is "an officer in the Commonwealth," within the meaning of Article VIII, Sections 1, 20, of the Constitution, which disfranchises those who should send or accept a challenge to or from a citizen of the State from holding any such office. The legislature can not, by special law, excuse the collector from taking this oath, as the Constitution reserves this power of dispensation to the Governor as part of the pardoning power.¹³

A provision of the Constitution, that the police courts then existing "shall remain until otherwise directed by law," and that the "judges, clerks and marshals" thereof shall be elected in a certain manner, has been construed: that the legislature can not, as long as these courts "remain," change the mode of electing the officers thereof; these must be elected at the same time (first Monday in August of even years) and in like manner as county judges, sheriffs and county clerks. But the legislature can abolish the old court, and, creating a new one in its place, regulate the latter with all its officers at discretion.¹⁴

¹² *City of Paducah v. Cully*, 9 Bush, 323, 326.

¹³ Art. VIII, Sec. 21. *Morgan v. Vance*, 4 Bush, 823. So much of the opinion in this case intimated, that the fact of the officer's guilt could be inquired into collaterally in an action of trespass brought against him for a levy made (in any other way, in

fact, than by indictment for sending the challenge, has been overruled in *Commonwealth v. Jones*, 10 Bush, 725.

¹⁴ Art. V. Sec. 41. *Trustees of Owensboro v. Webb*, 2 Metc. 576. *Contra*, *Boyd v. Chambers*, 78 Ky. 140.

But as to officers not specially named in the Constitution, including those of cities and towns, referred to generally in Article VI, Section 6, the legislature has unlimited power to shorten or cut off the term, either by abolishing the office altogether or by ordering a new election before the old terms have expired. Acts of this sort are often passed under the stress of party feeling; and the passion that was at work with the legislature sometimes reaches the bench. A case arising under an amendment of the charter of Lexington was decided in 1866, Judge Williams dissenting, and Chief Justice Marshall delivering a separate opinion, being dissatisfied with the passionate outburst of Judge Robertson; an act was sustained which ordered a new election of mayor and city attorney, though the terms of the incumbents had not expired.¹⁵

The appointment of some local officers may be vested in the courts of law, notwithstanding the division of the powers of government into legislative, executive, and judicial. Circuit Judges and Chancellors appoint, as of course, their masters in chancery, commissioners or general receivers; and where the duty of appointing police commissioners was laid upon a judge, the law was indeed held bad on other grounds; but the Court of Appeals gave no weight to the objection, that a judge should have no power of appointment not connected with his court.¹⁶

The term of four years, named in Article V, Section 41, of the Constitution, was exceeded in the law concerning the Commissioner of the Louisville Chancery Court; but this was held to be no objection, as this is not "a county or district office."¹⁷

The section reads: "The General Assembly may provide for the election or appointment, for a *term* not exceeding four years, of such other county or district ministerial and execu-

¹⁵ Standeford v. Wingate, and Gibbons v. Young, 2 Duv. 440. The majority of the court claim that Hoke v. Henderson, 1 Dev. (N. C.), 67, is the only decision to the contrary.

¹⁶ Speed & Worthington v. Crawford, 3 Metc. 207.

¹⁷ Smith v. Cochrane. 7 Bush, 147. See Civ. C. Prac., Secs. 779, 784; and the recommendation of a majority of the bar may be made a prerequisite, it being presumed that it will not be exercised on selfish grounds.

tive officers as shall from time to time be necessary and proper." (Article IV, Section 10.)

Hence the incumbent of any such office must vacate at the end of his own term, and can not hold over till his successor is appointed or elected and qualified. It was so held as to a "trustee of the jury fund" who is appointed in each county, with power to collect certain fines and fees on behalf of the Commonwealth, and to disburse money to jurors and for similar purposes.¹⁸

But commissioners to carry out a temporary work, for instance, to direct the building of a county court-house, do not fall within this provision, and a law which empowers a judge to appoint them during his pleasure is good.¹⁹

A law authorizing the appointment of deputies need not prescribe a term of office for them, as they naturally go out with their principal; and this rule was applied to the Auditor's Agents under the act of April 29, 1880, though they had to perform some duties which their principal, in the nature of things, could not perform himself.²⁰

SEC. 32. OFFICIAL EMOLUMENTS. As to official emoluments, as has been stated, the Commonwealth is not tied down by contract; but the Constitution protects "public officers" in other ways against the arbitrary reduction of their salaries. It provides as to the Governor, the Judges of the Court of Appeals, and the Circuit Judges,¹ that they shall, "at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during the time for which they were elected;" and in the case of Circuit Judges it "shall be uniform and equal throughout the State."

By another section² it is made the duty of the General Assembly to "regulate, by law, in what cases, and what deductions from the salaries of public officers shall be made for neglect of duty in their official capacity."

It has been held that the latter section protects all public

¹⁸ *Offutt v. Commonw'lth*, 10 Bush, 212.

¹⁹ *McArthur v. Nelson*, 81 Kentucky, 67.

²⁰ *Hoke v. Commonwealth*, 79 Ky. 567, 574.

¹ Art. III, Sec. 7; IV, Secs. 3, 25.

² Art. VIII, Sec. 13.

officers in their stated income against reduction for causes other than neglect of duty, and not the Governor and Judges alone. But the decision was made as to a "criminal court" judge and a "vice-chancellor," both of them holding the rank and part of the jurisdiction of a circuit judge. An act having been passed to reduce their salaries during the term, the Auditor was compelled by mandamus to issue warrants for the full amount of the original salaries.³

The legislature has attempted more than once to have the compensation of special judges deducted from the salary of the Circuit Judge. In one case the Auditor, in obedience to an act (passed in 1851), made the deduction in the warrant; but the law was held void, as the failure to attend or the impropriety of his presiding (Article IV, Section 28) does not imply neglect of duty on the part of the Judge.⁴

In 1871 the legislature, while granting to Circuit Judges and to the Chancellor of Louisville an increase of salary during their terms, attempted to deduct *from this increase alone* the compensation of special judges; the matter was tested by the Chancellor, and he was not considered as estopped by accepting the larger salary.⁵ All attempts to save the cost of special judges to the State treasury have since been abandoned, and the clause authorizing the General Assembly to regulate deductions for neglect of duty has become a dead letter.

A law now compels the city of Louisville to pay an extra salary to the Judge holding the Circuit Court within it. It has not been tested as to conformity with Article IV, Section 25, as to uniformity in the salary of Circuit Judges.

But the legislature has full power over official fees. An act requiring certain officials of Jefferson County to account for their fees above a given yearly sum to the Commonwealth, and taking effect during the term of those then in office, was unhesitatingly sustained.⁶

³ Perkins v. The Auditor, Pope v. same, 79 Ky. 810.

⁴ Adams v. The Auditor, 18 B. M. 150. Approved in Garrard v. Nuttall, 2 Metc. 106, where the Treasurer attempted to dishonor the warrant

drawn in favor of the regular Judge, because he had paid the same amount before to a special Judge.

⁵ Auditor v. Cochran, 9 Bush, 7.

⁶ Commonwealth v. Bailey, 81 Ky. 395.

CHAPTER V.

CONSTITUTIONAL LIMITS ON TAXATION.

SEC. 33. Uniformity and Moderation.

SEC. 34. Purposes of Taxation.

SEC. 35. Suburban Property.

SEC. 36. Local Assent.

SEC. 37. The Power to Assess.

SEC. 38. Minor Points on Taxes.

SECTION 33. UNIFORMITY AND MODERATION. How far "due course of law" must be observed in the assessment and enforcement of taxes has been shown above; also how exemption from the payment of taxes, granted either in consideration of money or of public service, are secured against repeal, as binding contracts. But before such an exemption can be deemed irrepealable, or even valid for any purpose, it must be tested by the first section of the Kentucky Bill of Rights,¹ to see whether or not the privilege granted is supported by some public service. And when an exemption granted by one law is tested, before another law has been passed seeking to revoke it, no Federal question arises for the Supreme Court at Washington, there being no "law impairing the obligation of contracts."

In 1885 the Court of Appeals (one judge dissenting) laid down this broad rule:

"The test of the right to exempt property is the existence of the right to levy a tax to foster such property:" though the courts have for a hundred years sustained the exemption of Church property, which the State is expressly forbidden to foster out of the public revenue.

¹ Art. XIII, Sec. 1; see Ch. I. Sec. 3. Whether there is an exemption, and how far it extends, must be

treated elsewhere as a question of the construction of tax laws.

By an act of 1873 freedom from State taxes, and, with the assent of the City Council, from city taxes also, had been granted to the Louisville Board of Trade upon a lot of limited dimensions; without passing on the validity of the exemption from city taxes, the Court of Appeals held the State exemption bad, for want of a consideration in "public service." No duties bringing any benefit to the State were imposed on the "Board of Trade," its main object being the collection and dissemination of information on trade and business, and the framing of rules for the conduct of business men in the city of Louisville. This may be useful to the city, and incidentally to the State at large; but the benefit is not direct enough to justify a tax on all the people of the Commonwealth; and the exemption of the property belonging to this body is virtually a tax on everybody else.²

The same question arose in the case of the Louisville Water Company and of the Masonic Temple Company, the latter a simple joint stock company, only in part composed of Masonic lodges, which owns the "Masonic Temple," and which claimed an old exemption that had been granted to a former corporation, now defunct, in return for some very shadowy duties. But the former case went off on the ground that the exemption act was held to be prospective only, while the tax involved had accrued before its passage; the latter case on the ground that the exemption died with the old corporation and did not run with the land.³

But the same methods need not be pursued in taxing all kinds of property; the assessments of railroads, first at so much per mile,⁴ afterward by a commission acting independently of the local assessors, have been sustained.⁴

² Barbour, sheriff, v. Louisville B'd of Trade, 82 Ky. 645. And a hotel is not such an institution as a town can exempt, with or without legislative authority, from the town taxes; Lancaster v. Clayton, 86 Ky. 373. (See Weeks v. Milwaukee, 10 Wis. 242.)

³ Louisville Water Company v. Hamilton, 81 Ky. 517; Commonwealth v. Masonic Temple Co., 87 Ky. 349.

A new suit against the Water Company for State taxes went off in the summer of 1889, for want of authority to sue any one but a railroad company for State tax. (Lou. Water Co. v. Com'w'lth, 11 Ky. Law Rep. 414.)

⁴ Evansville & Henderson R. R. Co. v. Henderson, 9 Bush, 438; C. N. O. & T. P. R. R. Co. v. Commonwealth, 81 Ky. 492.

And a "commutation" is not an exemption. The provisions in the charters of banks and other joint stock companies, by which they pay a fixed sum per share into the State treasury in full of all taxes both State and local, has always been sustained in Kentucky as well as in many other States.⁵

It is impossible to have exact equality in the imposition of burdens. The legislature is not compelled by any special clause in the Constitution to lay all taxes upon a uniform plan, and may therefore lay them at will on such kinds of property or on such occupations as it deems best; for instance, while lands and houses are assessed to their full value and extent, many kinds of movable property are not taxed at all, and others only in part; churches and charitable institutions are exempted by general law; in the powers of taxation granted to cities, the kinds of personalty which must or may be included in the assessment roll are generally set out in detail; mercantile pursuits are subjected to a license tax, which becomes highest for the sale of wines and liquors, while mechanical trades are free; and these distinctions have been held allowable so often, the legislative power is so well recognized, that it is needless to quote authorities.⁶ An act of 1884, exempting all railroads thereafter from taxation for five years from the beginning of construction,⁷ is undoubtedly valid. An act of 1864, not now in force, which assessed the property of all railroad companies in the State at \$20,000 for each mile of track, was sustained against the objection of inequality raised by a railroad company, who complained that other railroads in the State, two of which it named, were of much greater value per mile than its own. The court answered the point somewhat evasively:

"But waiving other reasons for rejecting this argument,

⁵ *Farmers Bank v. Greenup County*, 6 Bush, 127; see also *Johnson v. Commonwealth*, 7 Dana, 842, *Franklin Co. Ct. v. Deposit Bank*, etc., 87 Ky. 370, where the sacredness of the bank charter provisions as to tax rate is put on the ground of a contract made on a good consideration.

⁶ The case is very different in Wisconsin, Iowa, California and other States, under whose constitutions all taxation must be uniform and in proportion to value.

⁷ See Bull. and Fel. ed. Gen. Stat. p. 1029.

which might be sustained on the authority of numerous decisions, we deem it sufficient to say, that while the evidence shows the other railroads to be worth more than \$20,000 per mile, etc., it wholly fails to prove that the appellant's road is not of the value of \$20,000 per mile."⁸

But inequality between individuals or neighborhoods can not be tolerated. Under the charter of the city of Covington, its streets could be improved by the council, at the expense of the abutters, only upon the petition of the lot owners or a majority of lot owners upon any one square; but power was given to the council to pave a certain named thoroughfare at the expense of the lot owners without their petition or assent. This was held an exercise of "arbitrary" power, an act of spoliation, and as such void under Section 2 of the Bill of Rights, and contrary to the spirit of the Constitution.⁹

In the leading case on "local assessments," which are but one kind of taxation, it was said: "We can not admit that the taxing power is in this country altogether arbitrary."¹⁰

The apportionment of the cost of improving streets and sidewalks, and of wells, pumps, and fire cisterns in towns and cities, may be made either by the front foot or by the area of the lots benefited; and both policies have been adopted at different times and have been sustained in numerous cases; but the principle of equality is violated by making each lot owner pay the cost of improving the street in front of his own lot; for, by reason of difference in grade the cost per foot might differ greatly, while the benefit to each lot along a continuous distance would be the same.¹¹

As no one's property should be exempt, none should be taxed doubly. In other States the rule against double taxation is, in the absence of express provision, treated as one of policy and construction only;¹² but the Court of Appeals in one case went further, and held that a city could not be

⁸ *Evansville, H. & N. R. R. Co. v. heirs*, 9 Dana, 513, 518.
Commonwealth, 9 Bush, 444.

¹¹ *Ibid.*

⁹ *Howell v. Bristol*, 8 Bush, 493.

¹² *Cooley on Taxation* (1st ed.); see

¹⁰ *City of Lexington v. McQuillan's* p. 160.

allowed to tax private carriages along with all other property *ad valorem*, and to subject them at the same time to a yearly license fee of three dollars.¹³ This double taxation, it was said, would often run up to five or six per cent *ad valorem*, and amount to "taking private property for public use." This is a rather delicate position for a court to occupy; it is assuming a veto on the rates of taxation.

But it is not double taxation to tax the property of towns-people toward the cost of the county roads, although they must, under their town charter, also pay town taxes for the several municipal purposes, among others, for the grading and paving of streets. As they enjoy the benefits of their own streets, and are also benefited by the trade which is brought to them by the county roads, it was deemed only just that the towns-people should be made to contribute toward the support of both.¹⁴

In cases which will be noticed hereafter, under the power of cities and towns to bind themselves by contract, it was held, without constitutional objection, that a city might pay under its general powers for some street improvements, etc., though others of a like kind were paid for by districts or by the abutting lot owners.¹⁵

Where a district is to be benefited through the proceeds of a tax (for instance, a precinct by its subscription to a railroad), the owner of a particular spot within the district can not claim exemption because that spot would derive no benefit;¹⁶ but this rule has its limits, for which see below: *Sec. 35. Suburban Property.*

As to excessive taxation the court intimated, in the case of a street assessment, that if the share of the cost of improvement falling upon a lot should be so large as to swallow up its value, there might be good ground to enjoin the city from having the work done at the lot owner's expense, but refused

¹³ *Livingston v. City of Paducah*, 81 Ky. 656.

¹⁴ *Wolf v. McHargue*, 10 Ky. Law Rep. 821.

¹⁵ *Frantz v. Jacob*, 11 Ky. Law

Rep. 55; *City of Louisville v. Hyatt*, 5 B. M. 199.

¹⁶ *McFerran v. Alloway*, 14 Bush, 580; the objector owning an island in the Ohio within the tax district.

to relieve him after the work was done and the work apportioned.¹⁷ Soon afterward, where the improvement of the street had by change of grade greatly lessened the value of certain lots, so that now the apportioned cost outran that value, the Court of Appeals, while admitting that there were precedents to the contrary in Missouri and in California, dismissed the suit of the contractor on his statute lien, on the ground that to enforce it would be unconstitutional spoliation.¹⁸

Country roads can not be improved, like city streets, at the exclusive costs of the abutters. Such roads are of benefit to a large neighborhood: and the few who own the adjoining lands ought not to bear the whole burden, there never being such a general net-work of roads through a county built on the same plan as would equalize the cost to all, such a system as prevails in cities for the improvement of streets.¹⁹

SEC. 34. PURPOSES OF TAXATION. Where a tax is raised for the general expenditures of the State or of a county or city, the courts can not meddle with its collection on the ground that it will be in part applied to purposes lying outside of the province of government. But where a tax is raised for a specific purpose, or where a municipal division is authorized to borrow money for such purpose and to levy a tax in order to repay the loan with the proceeds, any owner of property within the district may test the existence or validity of the law authorizing such loan or tax by seeking to enjoin it,¹ or by resisting the tax when it comes to be collected.

While nearly or quite all of the other "adhering" States sustained the validity of those State laws passed during the late war, under which counties, towns, and other districts raised

¹⁷ Preston v. Roberts, 12 Bush, 590.

¹⁸ Preston v. Rudd, 7 Ky. Law Rep. 806.

¹⁹ Graham v. Conger, 85 Ky. 582, referring to Lexington v. McQuil-
lan's heirs, 9 Dana, as giving this
justification for the improvement of
city streets at the cost of abutters.
This case came a second time before
the Court of Appeals, after the plain-

tiff by additional pleading and proof
had attempted to show special
grounds for the apportionment or-
dered by the local law; but these
were held insufficient. Conger v.
Graham, 11 Ky. Law Rep. 12.

¹ Ferguson v. Landram, 1 Bush, 548.
Allison v. Louisville, H. C. & West-
port R. R. Co., 9 Bush, 247; Frantz v.
Jacob, 11 Ky. Law Rep. 55.

taxes and loans to free themselves from the draft, or to aid volunteers and encourage volunteering, the Court of Appeals of Kentucky held, unanimously,³ that the legislature could not authorize any such taxation. In dealing with local acts, under which the "county courts" of two certain counties sought to relieve themselves through the proceeds of county bonds from the impending draft, Chief Justice Peters, in speaking for the court, laid stress on the exclusive war powers of Congress, and seemed to think that a State had no more right to aid than to thwart the General Government in the prosecution of a national war by any exertion of its own reserved powers. Judge Robertson, however, in a separate opinion put the judgment of the court on more tenable grounds. He said: "These local laws are enacted, not to raise soldiers or to increase the military power of the National Government, nor for the protection of the State, *but to relieve those liable in these respective counties from the draft*, or, in other words, *to enable those subject to this military service to escape from it.*" Quoting from the opinion then recently delivered by the Supreme Court of Pennsylvania in *Speers v. School Directors of Blairsville*: "The question is therefore narrowed *to a single point*, is the purpose in this instance a *public one?*" he proceeds to return a negative answer, holding that the only benefit to be derived from the bounty tax is a private one, inuring to the few men liable to be drafted, while all property holders alike, male or female, within, below or beyond the military age, and those exempted for any of the many causes, must bear the burden of the tax.

But a poll tax levied in one of these counties on all those liable to draft, to be applied to their relief, was sustained. And the court refused to restrain the collection of the tax as far as it might be assessed against those who had taken part in petitioning for the enactments, or who had accepted benefits from the bounty fund, that is, who were drafted, and had their substitutes paid for out of money advanced on the faith of the proposed county loans. This led to some very complex adjustments, which again came before the Appellate Court on

³ *Ferguson v. Landram and Cloud v. Coleman*, 1 Bush, 548.

a second appeal.³ But the same principle was carried further in a case arising under a school law, which authorized every school district in Bracken County to vote on the levy of a local school tax. A white property owner, contesting the legality of the tax, raised the point that, in violation of the Fourteenth Amendment, its proceeds were to be used for white school children alone, and this point was raised again under a school tax law for the town of Fulton. It was held that such an objection, if good, could only be made by a colored property owner, not by one who would rather gain than suffer by the injustice of the law.⁴ This doctrine of apportioning the validity of a law according to the *status* of the parties complaining of it, though just, must often lead to very embarrassing complications. It has, however, been fully adhered to in recent cases.

The majority of the court, in *Slack v. Maysville & Lexington Railroad Company*, held, in 1852, and the decision has not been shaken or questioned since, that a city or county may subscribe stock to a railroad (as had before been held as to turnpikes) which runs through or into it, and may lay a tax to meet the subscription, if authorized so to do by the legislature.⁵ Even donations made by counties to a railroad (the Cincinnati Southern) have been authorized, and the tax been collected without objection. It is not so clear whether the improvement of a river is a public purpose for the counties by which the river flows, or for a city to which some trade comes over such river. The legislature had authorized certain counties along the course of the Kentucky River and the city of Louisville to take stock in a corporation which was to improve its navigation by locks and dams. Garrard and Mercer counties had agreed to subscribe, but afterward refused to comply. The opinion of the court, as first delivered, but which upon a rehearing was abandoned by all the judges but Judge Hardin, who had written it, took the ground that the

³ *Ferguson v. Landram*, 5 Bush.

⁴ *Marshall v. Donovan*, 10 Bush, 681; *Norman v. Boaz*, 85 Ky. 557.

⁵ *Slack v. Maysville & Lexington*

R. R. Co., 13 Bush, 1. See also *Shelby County Court v. C. & O. R. R. Co.*, 8 Bush, 209.

improvement of a river was not, like the building of a railroad or turnpike, a public purpose for the particular counties, but rather for the State at large. The other judges united in defeating the subscription, but upon wholly different grounds, and refused to pass on this question.⁶ In a MS. opinion the subscription of Louisville was declared void, on account of the remoteness of the city from the improvements to be made.

It is, however, fully admitted by the bench and bar of Kentucky that public loans can not be raised, nor taxes levied, to forward any industrial undertakings other than the means of travel and transportation, or to supply light and water.

Farm owners have often sought permission to lay a special tax upon a district of land with a view to the common improvement or reclamation of their lands. The draining of ponds can generally be accomplished only by working upon tracts much larger than those of any single owner. Hence the creation of pond-draining districts, with powers to levy a local tax, is well known in many States. Yet in the first Kentucky case which came before the Court of Appeals under the peculiar circumstances, that the promoters of the act were seeking to benefit their own flooded lands at the expense of others owning high and rolling lands, the court said, after summing up the facts: "The corporation created by the act is essentially private. Its objects and purposes do not even partake of a public nature, but are confined to the private interests of the persons subjected to its operation." But in proceeding further the court rests its decision against the validity of the act, on its injustice to the unwilling and protesting land owners, called upon to pay from their own means for the benefit of scheming neighbors, and compares the case to that of owners of farm lands who are brought unwillingly within the bounds of a city.⁷ (See next section as to suburban lands.) In a subsequent case "the draining of marshes and ponds for the promotion of the public health" is enumerated

⁶Garrard County v. Kentucky River Navigation Co., and Mercer County v. Same, 8 Bush, 431. Congress has since, by undertaking the

improvement of the Kentucky River, justified Judge Hardin's views.

⁷Cypress Pond Draining Co. v. Hooper, 2 Metc. 350.

as one of the purposes for which local taxes may be imposed ; but the running of a fence around a whole district, with a view of a saving in fences round the single tracts, is declared to be a private enterprise, and the assessment laid by the local body, under its legislative charter, on an unwilling land owner within the district is disallowed.⁸

SEC. 35. SUBURBAN PROPERTY. The courts of Kentucky, of Iowa, and of Nebraska, alone among all the States, have undertaken to question, in each instance, the power of the legislature to include in a city or town neighboring tracts of land without the consent of those owning the lands or dwelling upon them, and thus to subject these persons and their property to municipal taxation.

The objection was first raised to an act of 1846, enlarging the town of Hopkinsville, by a land-owner in the newly-added district, who replevied a distress for the town tax as illegal. Part of the addition lay in fields, and was so described in the act. Other parts were small lots with residences, some of these being separated from the original town by the width of the street only. Chief Justice Marshall, in delivering the judgment of the court, held : That the legislature can confer the taxing power on municipal bodies ; that the owner's assent is not necessary to a law bringing his lands within the tax limits ; that, when people have built up a *de facto* town close to an incorporated town, they may be included in it and compelled to share its burdens, but that the constitutional guaranty against taking private property for public use, though meant in the main for a wholly different purpose, might be invoked by the owner in flagrant cases, should woodlands, fields, and pastures in large tracts be brought into a town for no other purpose than to swell its revenue. The town extension was sustained,¹ and it was also held good against the objections of one owning a farm of one hundred and forty acres, of which thirty-four acres with the residence had been brought into town ;² but the reasoning of the court in these cases encouraged other contests, some of which were more successful.

⁸Scuffletown Fence Co. v. McAlister, 12 Bush, 317.

¹Cheaney v. Hooser, 9 B. M. 330.

²Sharp v. Donovan, 17 B. M. 228.

The suburban residents brought unwillingly into a city or town can, at any rate, not object to the exercise of its police powers, nor to the payment of school taxes, if they are near enough to the city schools to avail themselves of their benefits;³ and where the citizens pay a tax for railroad subscriptions, this also may be levied on suburban lands not liable to other burdens.⁴ The distinction is so well recognized, that in Louisville large tracts have for many years been regularly assessed as "acre property" only for "schools and railroads."

As to other city taxes, the inclusion of "large tracts" of farm, pasture, or woodlands against the will of the owner is not allowable. The word "large" has, however, a somewhat indefinite meaning. The inclusion can not be justified because needful to round off or straighten the outlines of the city, and to give a passage from one of its parts to another, for the convenience of the old citizens should not be served at the disproportionate cost of the unwilling new ones.⁵

The Ohio River, as far as low-water mark on the northern shore, as held by the Supreme Court of the United States in *Handley's Lessee v. Anthony*, 5 Wheaton, 374, lies within the limits of Kentucky, and the river in front of Louisville is included within its chartered boundary. But an act which seemed to permit the parts of a bridge lying beyond low-water mark on the Kentucky side to be taxed by the city was held void, upon the ground that the bridge, or at least the part in question, lay beyond the region in which the city government could give protection or substantial benefits.⁶

When the newly-included land has been laid out into building lots, the owner can no longer protest against its subjection to city tax. The law on the whole subject is summed up in a MS. opinion of 1887:⁷

³ *City of Henderson v. Lambert*, 8 Bush, 607.

⁴ *Courtney v. Louisville*, 12 Bush, 419.

⁵ *Southgate v. Cov'ton*, 15 B.M. 491.

⁶ *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189.

⁷ *Torbett v. City of Louisville*, 9 Ky. Law Rep. p. 302. See also *Arbegust v. City of Louisville*, 2 Bush, 271; *Swift & Co. v. City of Newport*, 7 Bush, 37, where the usual rule is enforced, that usurpation by the law-making power must be shown clearly.

“Undoubtedly, land held for and adapted to agricultural purposes only can not be subjected to ordinary municipal taxation merely because of proximity to a city, although this fact may afford extra facilities for reaching the city, and renders it more valuable, nor merely because of improvements constructed by the municipality. If so, the area of taxation would be made to depend merely on municipal energy in extending improvements, instead of the area in fact occupied by a town or city population. . . . If the land is adapted to municipal uses, if it derives an increased value from the proximity of the municipality, and there is a town or city population on or near it creating a necessity for municipal government, or *at least rendering the extension of it over it reasonable*, then the owner must contribute his proper proportion of the public burden.”

The reasoning of these cases will also apply where the legislature, against the will of some of the land owners or residents, incorporates a tract of country into a new town, with power in its governing body to levy municipal taxes. In the only reported case in which an act to that effect was drawn into question, it was sustained on grounds such as those stated above.⁸

In the cases tried at law the Court of Appeals felt the awkwardness of leaving it virtually to the jury to decide upon the validity of an act of the legislature, by passing on the same facts which that body ought to have examined before granting or amending the town or city charter, and it was suggested that a case of this nature ought, as far as possible, to be disposed of by the instructions of the court.

Where the power to borrow a certain sum on the faith of a municipal tax is given, making it reach over considerable tracts of farming land which can not be constitutionally thus taxed, and the exemption of which would greatly increase the burden of the real town, the whole scheme must fall to the ground, as the higher rate of tax could not have been within the contemplation of the law-maker.⁹

⁸ *Maltus v. Shields*, 2 Metc. 553. ⁹ *Parkland v. Gaines*, 11 Ky, Law Rep. 64.

SEC. 36. LOCAL ASSENT. The Constitution forbids the State government from incurring a debt, except to meet casual deficits, to renew old debts at maturity, or to repel invasions and suppress insurrections, unless with the consent of the whole people given at a general election.¹ This clause does not apply to the counties, cities, or other divisions of the State, as was held in 1852 in a case already quoted,² by three judges against one (Hise), who dissented in an opinion of inordinate length. Bonds have been issued ever since, under local laws, by the governing bodies of counties, cities, and towns, sometimes without, sometimes with the assent of the voters or tax-payers, given in such a way as the legislature happened to prescribe, or upon their assent given or signified before the passage of the act.

In the leading case just quoted it was objected, that by submitting the subscription, the loan, and the tax to the approval of the people of Mason County the legislature improperly delegated the law-making power: but the point was overruled. It seems that in Kentucky a law may be made to take effect on a condition precedent, and that a favorable vote of the people most nearly affected is not an improper condition.³ From this reasoning it was further concluded, in a case already quoted for another purpose, that the assent of the local public to a tax or loan, under an act of the legislature calling for it as a condition precedent, is not an election within the meaning of either the State Constitution or of the Fifteenth Amendment; that, therefore, the exclusion of negroes and the inclusion of certain women and aliens does not affect the validity of such a condition.³ In some cases only the tax-payers of a district have been called upon to express their assent, and in many cases heavy loans requiring the imposition of heavy taxes have been voted by the governing body of a county or city.

¹ Const., Art. II, Secs. 35 and 36.

² *Slack v. Maysv. & Lex. R. R. Co.*, 13 Bush, 1. The district need not coincide with any of the political divisions of the State. County Judge

of *Shelby Co. v. Shelby R. R. Co.*, 5 Bush, 525.

³ Local option laws have been sustained on the same grounds.

³ *Marshal v. Donovan*, 10 Bush, 681.

The question whether a precinct (which corresponds to a Northern township) can be compelled by the legislature to subscribe money to a railroad was raised, more in form than in substance, in the *second* case of *Allison v. Louisville, Harrod's Creek & Westport Railroad Company*. In the first case between those parties (already discussed) it appeared that the Harrod's Creek precinct in Jefferson County had subscribed a sum to the appellee railroad company's stock; but on account of some non-compliance with the enabling act the bond-issue to meet the subscription was enjoined. Thereupon the legislature passed a new act, reciting the willingness of the precinct to subscribe a named amount of stock, and ordered the County Judge to subscribe it and to issue the bonds in the name of the precinct. It was held that the recital in a public act (this act was deemed to be public, though local) was evidence of the fact recited, that the assent must therefore be presumed, and the subscription was sustained.⁴ But in a much earlier case already noticed, in which the local taxing authority was disallowed as not being directed to a public purpose, the court, quoting its own preceding line of decision, says that "an enactment *ordering* the imposition of a local burden would not depend for its validity on the fact that it had been passed on the petition of a majority, or of less than a majority, of the citizens to be affected by it, or upon a petition from any of them."⁵

But while the legislature may delegate local taxing powers to such a body as a town board or city council, it can not delegate them to a ministerial officer, like the assessor or collector (nor it seems to a mayor), nor vest him even with the power to diminish a tax-rate below that named in the statute, upon his own judgment of the city's needs.⁶

SEC. 37. THE POWER TO ASSESS. The function of assessing for taxation, either State or municipal, belongs to that class

⁴ *Allison v. Louisville, H. C. & W. R. R. Co.*, 10 Bush, 1.

⁵ *Cypress Pond Draining Co. v. Hooper*, 2 Metc. 354. The principle that the legislature can impose a local tax for a local purpose without any local assent, is reaffirmed in *Fitz-*

patrick v. Board of Trustees, 10 Ky. Law Rep. (1888) as to a school tax.

⁶ *City of Louisville v. Murphy*, 86 Ky. 53: "But if such power had been granted to these officers, it would be null and void."

of officers whom the Constitution calls "ministerial," and to whom its fifth article "concerning executive and ministerial officers for counties and districts" is devoted. The eleventh section provides for the election of a county assessor, with power to appoint assistants, and every city charter makes provision for a city assessor, so that the same land is often assessed at different values for State and for local purposes. The assessment of property which has not listed by the owners within the proper time has in some cases been left to the Sheriff, in other cases to the County Court. The latter, acting judicially, compels the owner to make his list, and acts ministerially in making the valuation. It has been said that assessment is not a judicial act, but that the County Court can perform such an act, because its functions under a former Constitution are manifold, and the present Constitution shows no intent to abridge them.¹ In a late railroad case, the validity of the law conferring such power on the County Judge was said to be beyond question.²

On the hearing of several heavy tax suits against railroad companies, which in 1883 came before the Court of Appeals, the remark was made in the opinion that the "act of valuation is in its character judicial"—but it seems nevertheless not to be a task for a purely judicial court. For even in this case it is left in doubt, whether the law can grant an appeal from the County to the Circuit Court on the measure of value, the court saying: "The Chancellor and Common Law Judge should hesitate before converting themselves into tax gatherers or assessors."³ But in an older case a motion to "credit" appellant's assessment, both by striking out improper items and by reducing values, was made in the County Court, and on a direct appeal the Court of Appeals gave its views not only on the law questions, but on the valuation too: a position hardly

¹ Pennington v. Woolfolk, 79 Ky. 13; Baldwin v. Shine, 84 Ky. 502. See Const., Art. IV, Sec. 33 (former jurisdiction to remain until changed).

² L. & N. R. R. Co. v. Commonwealth, 85 Ky. 198, 211.

³ Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth, and two other cases, 81 Ky. 492, 497, 505. Value considered on appeal in City of Louisville v. Commonwealth, 1 Duvall, 295.

compatible with those which rest the power of the County Court on its ministerial character ; for, if the act is ministerial, there can be no appeal.

The "supervisors" or other boards of review, for State or municipal taxes, are not courts, but administrative bodies.⁴

The naming of county assessors in the Constitution is not accompanied by any definition of their duties. There is nothing to indicate that their action is to be final, or that it is to cover the whole ground. Hence, the legislature has power to establish a State Board of Equalization, and such board may, upon hearing suggestions and obtaining information, increase the aggregate valuation of some counties and lessen it for others, with a view of equalizing the burdens of the several parts of the State;⁵ and it may intrust to a board of Railroad Commissioners appointed for the whole State the task of assessing the property of railroads without appeal.⁶

Though the assessment of the property of railroad companies (road and rolling stock) at \$20,000 per mile by an act of the legislature using the very words "*hereby assessed*" had been sustained,⁷ at least, in a case in which the objecting company did not show that the valuation was excessive, the Court of Appeals in an unpublished opinion (rendered in 1888 and held up on re-hearing till 1889), but published prematurely in the Southwestern Reporter, decided that the legislature could not assess, and therefore could not adopt and confirm a "void" assessment for back years as a basis of taxation in a curative act.⁸

The law has generally granted to some officer or board the power to revise, with or without complaint, either State or city assessments; and though the Court of Appeals said, in 1883,⁹ that for five years (1873 to 1878) no such revisory power existed by law as to State revenue, there certainly was

⁴ *Rennick v. Curry*, 3 Ky. L. Rep. p. 156.

⁵ *Spalding v. Hill*, 86 Ky. 656.

⁶ *Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth*, 81 Ky. 492.

⁷ *Evansville & H. R. R. Co. v. The Commonwealth*, 9 Bush, 438. (See also comments on the act in L. & N.

R. R. Co. v. Com'nw'th, 1 Bush, 253.)

⁸ *Slaughter v. City of Louisville*. First opinion, issued June, 1888, was suppressed, and upon the overruling of the petition for re-hearing only a mandate was issued.

⁹ *Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth*, 81 Ky. 492.

a Board of Supervisors, three for each county, then provided by the General Statutes, and moreover the County Judges exerted their old prerogative of allowing "credits" on motion till deprived of it by the new revenue law of 1886, which confers the power of revision on a board of five supervisors for each county, and to it alone. The court says here, also, that the tax-payer has no constitutional right to a hearing, and that the loss of the privilege during the five years was borne without complaint. No notice is taken here of a case decided as late as June, 1882, when the same court, speaking of the provision in a city charter for a board of review, says: "Its provisions are necessary to protect the citizens against unjust mistakes and fraudulent assessments."¹⁰ And in 1888 the doctrine of *Hagar v. Reclamation District* (111 U. S.), that there ought to be a hearing on the matter of apportionment, but that the power of the court to correct the ministerially made apportionment, which can only be enforced by suit, fills the requirement, was recognized and approved.¹¹ But where a revisory board undertakes to *raise* assessments on individual parties above the assessor's valuation, it is conceded that the parties should have an opportunity to be heard.¹¹

The State Board of Equalization gives no notice of its sessions; the law of its creation, however, fixes the time and place of meeting, which is equivalent to notice.¹² The method under which it works, of raising or lowering *all* the lands, *all* the town lots, *all* the personal property in any one county, by a uniform factor, was also sustained in the same case.

SEC. 37a. MINOR POINTS ON TAXES. The power of the legislature to authorize the enforcement of taxes by ordinary suit, concurrently with other remedies, has been questioned, but without any good reason; and it has always been sustained.¹ Nor is there any doubt as to the power to order an assessment *in rem*, so that the naming of the true owner becomes immaterial.²

¹⁰ *Ormsby v. City of Louisville*, 79 Ky. 197; *Greer v. City of Covington*, 83 Ky. 410.

¹¹ *Nevin v. Roach*, 86 Ky. 492.

¹² *Spalding v. Hill*, 86 Ky. 656.

¹ *Ormsby v. City of Louisville*, 79

² *Husbands v. City of Paducah*, 5 Ky. Law Rep. 193.

The legislature has the power to tax all personal property within the State (unless it be merely in transit), though it belong to non-resident owners.³

Railroad and turnpike companies have questioned the legislative power to "break them up into parts," and to subject the parts lying in any one county or city to taxation by itself. One opinion of the Court of Appeals reproves such a mode of taxation strongly, but it can hardly be said to impugn its constitutionality.⁴ In a later case such legislation has been sustained, and any intimation against the existence of such a power put at rest.⁵

By setting up one system of taxation and collecting revenue under it, the law-maker makes no contract with the tax-payer which would guarantee him against a second or higher tax. Thus, under its charter of 1851, the city of Louisville could assess the abutters only for the first construction of streets, having to reconstruct them thereafter out of a general fund; but a clause in the charter of 1870 requiring a second construction of carriage ways at the expense of lot owners, who had already paid for first construction, was sustained.⁶

³ Commonwealth v. Gaines & Co., 80 Ky. 489.

⁴ L. & N. R. R. Co. v. Warren County, 5 Bush, 243; Ernst v. Applegate, 3 Bush, 648.

⁵ Frankfort, L. & V. T. P. Co. v.

Commonwealth, 82 Ky. 386.

⁶ Bradley v. McAtee, 7 Bush, 78. But the law was deemed oppressive, and the city was soon afterward authorized to refund the money paid for reconstruction to the abutters.

CHAPTER VI.

TAX LAW ASIDE OF THE CONSTITUTION.

SEC. 38. The State Revenue System.

SEC. 39. Old Revenue Laws.

SEC. 40. Local Taxes.

SEC. 41. Assessments.

SEC. 42. Remedies Against Unlawful Taxation.

SECTION 38. THE STATE REVENUE SYSTEM. Like other American commonwealths Kentucky raises her State revenue, and the cities and towns their local revenue, mainly by taxes on lands and other property apportioned according to value. The State revenue is at present regulated by the so-called "Hewitt" law of May 17, 1886, which takes the place of Chapter 92 in the new edition of the General Statutes. The rate, expressed in the customary Kentucky phrase, is $47\frac{1}{2}$ cents on each one hundred dollars of value.¹ All personal property with trifling exceptions is included, and all choses in action; yet no deduction is allowed for the debts which the assessed party owes.¹

This law has proved itself a great improvement on former laws in bringing out a full assessment; but has two great defects: *first*, there is no assessment map of the State, and the law still relies on the clumsy expedient of making each resident whom the assessor calls on give in his "list;"² *secondly*,

¹ For State revenue proper 20 cents, schools 22 cents, sinking fund 5 cents (which goes mostly to schools, as the school fund is the largest holder of State bonds), and Agricultural and Mechanical College $\frac{1}{2}$ cent; the last-named rate was imposed by a former act which is exempted from repeal.

² The deduction allowed in "line 99" of the schedule form, "Other

property," is wholly illusory, as all kinds of property are already enumerated. Debts owing to residents of Kentucky by persons abroad were even before this act held taxable (Thomas v. Mason Co. Court, 4 Bush, 186), although the *borrower* might, under the laws of his own State, be taxed for the borrowed capital invested in his business.

outside of cities and towns, improvements are not assessed separately, but are merely to be "considered" by the assessor in fixing the value of farms per acre. But many so-called farms are really country seats, where the dwelling house far exceeds the ground in value. The assessor's compensation comes in the way of a small percentage, on a sliding scale, upon the whole assessment of the county;³ it is therefore important to establish the principle that his duty is not a judicial act, as no one can be a judge in a matter in which he is interested.

The fifteenth of September in each year is the day "as of which" the assessment is made; that is, whoever then owns the property is assessed with it, and the "true cash value" which the property bears on that day governs. As between the holder of the legal title, the holder of the equitable title, and the "claimant or bailee in possession" (*i. e.*, husband as to wife's land, guardian, executor, administrator with will annexed, curator or trustee having control, life-tenant or agent with power to sell or rent), the burden is to rest on the holder of the equitable title, though the assessment is good if made against any one of the three. But a tenant for life must keep down the taxes during his term, even if the life estate be "determinable."⁴ He must pay on the whole value of the land, not on the capitalized value of his own estate.⁵ But a tenant for years, however long the lease, can not be assessed on the fee-simple; if the lease be valuable, it must be assessed as personal estate.⁶

A board of five supervisors, being housekeepers from different parts of the county, appointed in every year by the County Judge, must meet in every year to hear complaints from the assessment, as well as to equalize assessments generally, and

³ The city of Louisville, since the charter amendment act of April 8, 1882, makes its assessment on the basis of official assessment maps. As to State revenue, "if the owner fails to list the same, the assessor shall nevertheless list all lands in his county." Art. I, Sec. 10 (see p. 1037

of B. and F. ed. Gen. Stat.).

⁴ Johnson v. Smith, 5 Bush, 102, approved in Fox v. Long, 8 Bush, 551.

⁵ Arnold v. Smith, 3 Bush, 163.

⁶ Fox v. Long, 8 Bush, 553; Wilgus v. Commonwealth, 9 Bush, 557.

to supply omissions. They are to meet at the county seat on the first Monday in January: this notice of time and place in the law itself being deemed to dispense with a published or personal notice, and to enable them not only to reduce but also to increase assessments. Only, after they have corrected the list, the assessor's compensation is calculated upon it. Where property is omitted by the assessor, the sheriff may afterward place it on the assessment books and value it, though he receives a heavy compensation (twenty-five per cent) when such a tax on omitted property is collected.⁷

The collection of the State tax is intrusted to the sheriff, or, should he fail to qualify by proper bond, to a yearly tax collector, appointed by the County Court. After giving a certain time for tax-payers to call upon the sheriff at his office, he shall distrain, and if there be no personal property on which to distrain, he shall (after the 1st of June in each year) "sell for cash any real estate belonging to or listed by such delinquent tax-payer, or so much thereof," etc.⁸ The question arises here, whether land owned by A, but held in adverse possession and listed by B, can be sold for the latter's taxes, so as to bar the former's title. Considering the tendency of Kentucky courts, we should answer, No. The sale is to be made (except as to certain particulars) as under execution, and for failure of bidders the sheriff is to bid in for the State, at the tax and commission upon it. The time of redemption is two years, with 15 per cent fixed, and 30 per cent per annum, and county clerk's fees. Where the State bids in the land, the county attorney is to sue for possession, unless the land be redeemed within thirty days; any other purchaser can notify the owner, within fifty days, to redeem in six months, and in default of such redemption sue for possession.

To encourage bidders the law establishes a conclusive presumption in favor of the purchaser as against the former owner "that all the steps necessary to pass a good title have been duly and regularly taken," but the former owner may show in defense: 1. That the land was never assessed (not

⁷ B. and F. Gen. Stat., 1060. (Sec. 25.)

⁸ See B. & F. ed. Gen. Stat., 1070-1081.

that it was defectively assessed). 2. That the property was not subject to taxation. 3. That the tax was paid before sale.

Considering the views expressed by the Court of Appeals in cases arising under the Auditor's Agents' Act, and quoted above in the section on "Due Course of Law," it is not likely that the attempt to cut off all other defenses of the "former owner," even if the person listed for taxes should himself be such former owner, will be sustained.⁹

Shares of stock in State and National Banks, and in some other financial corporations, are taxed seventy-five cents on each \$100; and moreover, the surplus over capital stock, under whatever name, in excess of 10 per cent of the capital, is taxed at the same rate as real estate; and though all this goes into the State treasury, it acquits these banks and corporations of "all tax, State, county, and municipal," except the local tax on the bank building. The State taxes of these institutions are paid by their cashiers into the State treasury, without the intervention of the sheriff. All the banks of the State, in accordance with one of its provisions, accepted the rule of taxation prescribed in it in place of that contained in their charters; and the legislature reserved, by reference to Chapter LXVIII, Section 8, of the General Statutes (a reenactment of the act of February 14, 1856, referred to in Section 8, *supra*), the express right to repeal or to modify the act.

Railroads are, as theretofore, to be assessed by the State Railroad Commission on the following plan: Their whole length of mileage is returned by them, and how much thereof lies within any county, city, town, or taxing district; the whole value of track, rolling stock, and other property, is then stated by the officers of the road, and, with these statements before it, assessed by the Commission; then, if the road is partially out of the State, the value of the part within it, as to track and rolling stock, is computed in proportion to mileage; and the value liable for tax in any county, city, etc., in

⁹ See *supra*, Sec. 10, n. The same defenses, and none other, are by Art. X of the Revenue Law allowed in

"Attachments," i.e. garnishment suits for taxes; but few if any such suits have been or are likely to be brought.

like manner according to the mileage within it; the depots, offices, other buildings, and personalty are charged with the local tax of the place of their *situs*. The Commission furnishes the valuations to the local authorities, and the taxes of all kinds are then due on the tenth of October of each year.

There are also provisions as to the mode of taxing turnpikes and other corporations; also for license taxes, upon the sale of liquors, on peddlers, insurance companies, recording of deeds, law process, etc.

The validity of tax sales under this act has not yet come before the highest court of the State. A batch of injunction suits went there, brought by merchants who were unwilling to bear an assessment of their personalty and choses in action without deducting their indebtedness. But the court did not pass on the question, and affirmed the decree, dismissing the injunction suits on the ground that the plaintiffs could not take advantage of any irregularity in the assessor's functions, it being their duty to give in their lists and valuations upon the official blanks first, and on the further ground that the question of deduction is one which ought to be raised before the supervisors.¹⁰

The courts have no power to entertain a suit for taxes, either at law or in equity, on behalf of the Commonwealth (and it seems that the reasoning of the last decision would extend to city taxes), except when they are clothed with the power by the expressed will of the legislature. The present revenue law allows suits (other than garnishments regulated by Article IX) to be brought against railroad companies only; Article XI of the revenue law, as indicated by its sub-title, refers to suits against tax collectors and their sureties. The mere failure or inadequacy of the remedy, such as the absence of goods on which to distrain, does not justify the courts in taking jurisdiction.¹¹ Even against a water company, whose goods

¹⁰ *Belknap v. Clark*, 10 Ky. Law Reporter, p. 874. The decision on the last point in effect overrules a ruling in *L. & N. R. R. Co. v. Warren County Court*, 5 Bush, 243.

¹¹ *Baldwin v. Hewitt, Auditor*, 11 Ky. Law Rep. 199. The question, says Judge Holt, is not free from difficulty, and has been held otherwise in Illinois and elsewhere.

must not be distrained by reason of the irreparable harm which a suspension of its work would inflict on the public, a suit for State taxes can not be brought.¹²

NOTE.—The Kentucky law as to construing tax exemptions does not materially differ from the doctrine elsewhere. The exemption given to a corporation is not transferable; it does not pass with the property. (*Commonwealth v. Masonic Temple Co.*, 87 Ky. 349; *Kentucky Central Railroad Co. v. Commonwealth*, *Ibid.* 661.) A commutation paid to the State is presumed not to free from municipal taxes (*Kentucky Central Railroad Co. v. Bourbon County*, 6 Ky. Law Rep. 495); but where the charter says (as in the case of the banks) that the commutation paid to the State shall be in full of "all tax and bonus," it frees from local taxes, even on real estate. (*Farmers Bank v. Greenup County*, 6 Bush, 127; also *Bank cases*, 87 Ky. 370.)

SEC. 39. OLD REVENUE LAWS. Former revenue laws are still of interest as bearing on the validity of old tax titles.

There are, beginning with 1794, three periods in the history of these laws: *First*, from 1794 to 1822, when lands were liable to be sold for the delinquent taxes due upon them; *second*, from 1822 to 1872, when they were not sold, but only "stricken off" or forfeited to the Commonwealth; *third*, from 1872 to the present time, when laws for selling lands for taxes were in force similar in their outlines to the present revenue law.

Lands were by the oldest revenue law, that of 1792, made liable to tax whether held by patent, by survey, or by entry,¹ which comprised all the lands held by private ownership.

Those parts of the old revenue laws which refer to the lands of non-residents are placed by themselves in Morehead and Brown's Statutes, including those then repealed, as a part of the land law.² Among them the provisions of the revenue law of 1799 are the most important.

Ever since 1795 non-resident land owners had to enter their lands for assessment with the Auditor of State, and were to pay the taxes direct to the Treasurer of the State. The entry

¹² *Clark, etc., v. Louisville Water Co.*, 11 Ky. Law Rep.

¹ See *infra*, under "Virginia claims" for the meaning of these terms.

² M. and B. Stat. 1082-1094. For act of 1806, giving redemption, see *Ibid.* p. 1369.

once made in the name of one non-resident remained good for the purpose of validating all tax proceedings under it, though the title by death or by conveyances devolved on other non-residents;³ but if the owner became a resident, or a resident the owner, the entry had to be changed, otherwise proceedings on the old basis would no longer have any force. Upon default in payment, the Auditor would report to the Register a description of the land and the amount in arrears (this under the act of 1799, before which time the sheriff sold non-residents' lands, as well as those of residents), and the Register would then sell (at a time of the year fixed by statute) the lands, or "sufficient thereof," etc., at auction, after advertising for three months by bills posted at the state-house door, and in the "gazette of the public printer." He then made his deed under his seal of office.

There was no redemption until given by the act of November 28, 1806 (two years); and before 1799 no exemption of infants, etc.;⁴ but the act of that year (Section 23) gave to infants, married women, and those of unsound mind, two years after removal of disability before a sale for taxes could be had. This exemption held good only for the undivided shares of those under disability, even where the entire land was sold.⁵ The Register's (or Sheriff's) deed did not carry the title unless it bore a seal;⁶ but it need not recite that the sale was advertised.⁷ The officer who made the sale must make the deed, though he have since left office;⁸ a succeeding Register might affix the official seal. So, if the owner died after the sale, the sheriff or other officer might yet make the tax deed, disregarding such death.⁹

The Register's or Sheriff's deed raised the presumption that he had done his duty in all respects and made out a *prima facie* case.¹⁰ Those claiming against it might avoid it by prov-

³ Oldham v. Jones, 5 B.M. 458, 463.

⁴ Elliott's heirs v. Garrard, 1 Mar. 472; Hood v. Mathers, 2 Mar. 558.

⁵ Oldham v. Jones, 5 B. M. 458, 464.

⁶ Doty v. Beasley, 2 Bibb, 14; Shortridge v. Catlett, 1 Mar. 687.

⁷ Hickman v. Skinner, 3 Mon. 211. *A dictum.*

⁸ Graves v. Hayden, 2 Litt. 64.

⁹ Currie v. Fowler, 3 Mar. 504.

¹⁰ Bodley v. Hord, 2 Mar. 244; Graves v. Hayden, 2 Litt. 65.

ing that the tax had been paid before sale,¹¹ or that the sale was not advertised for the full three months,¹² or that in the Auditor's report to the Register the land was misdescribed, that report being the basis of the power of sale.¹³ The land was identified in the listing by reference to the name of the patentee or holder of survey; under the act of 1799 also by reference to the nearest water-course; a variance in the latter was therefore fatal. But a mistake in the number of acres, f. i. the Auditor reporting as 2,176 acres a tract returned to him as holding 2,200 acres, did not vitiate the sale, if the tract was otherwise fully identified.¹⁴ But where lands were sold for direct taxes of the United States, the presumption in favor of the Marshal's deed was not allowed, because the United States courts themselves followed the opposite rule, requiring from the purchaser proof of all prerequisites of the sale.¹⁵

The laws for the sale of the lands of residents differed from those concerning lands of non-residents but little; the property was listed with the tax commissioner of the district in which the owner resided, and the listing had to be changed on each devolution of title; the sale was made by the sheriff of the county, after advertising for one month at the courthouse door and for three months in the Gazette. The sheriff, after the sale, gave the purchaser a "certificate" of the land bought, and the county surveyor was then to lay it off on the ground. Moreover, when the delinquent lands of a resident lay in a county other than that of his residence, the sheriff could not sell, but had to report to the Register, who then proceeded as with non-residents' lands. The sale of a resident's land for tax carried by the express words of the law no title other than that of the "claimant," that is, of the party in whose name it was assessed.

On the 16th of November and the 7th of December, 1822, two acts were passed¹⁶ forbidding the sale of delinquent land to a private bidder, the former as against residents, the latter

¹¹ Bleight's heirs v. Banks, 6 Mon. 206.

¹² Allen v. Robinson, 3 Bibb, 328.

¹³ Bleight's heirs v. Banks, 6 Mon. 207.

¹⁴ Allen v. Robinson, 3 Bibb, 326.

¹⁵ Terry v. Bleight, 3 Mon. 271.

¹⁶ M. and B. Statutes, pp. 1877 and 1094.

as against non-residents. Henceforth, and until 1872, all delinquent lands were "struck off" or forfeited to the Commonwealth. The legislature did not give to any officer the power to sell the lands, which, by this "striking off" and the expiration of two years allowed for redemption, accrued to the Commonwealth; and when delinquents found that there was no danger of final loss they ignored these forfeitures, and neither redeemed nor paid new taxes. An act was passed to allow redemptions for which the time had long expired.¹⁷ It brought very little redemption money to the treasury. On the 17th of January, 1840, an act was passed under which the (second) Auditor was to appoint agents to sell these lands;¹⁸ but it was the duty of the agent, first, to hunt up the former owner and offer to sell to him for the amount of the price bid by the State, with interest and commission; if such former owner could not be found, or would not buy, then to offer the land on the same terms to any one in possession under adverse title; and if there was none such, or the one in possession was unwilling to buy, the agent might then sell to a stranger. As such agent was not a "public officer," nothing was presumed in favor of his acts, and through the difficulty of proving the prerequisites, his deed to a stranger, or even to the holder under adverse title, became almost worthless.¹⁹

The third period opens with an act of March 28, 1872, amending the Revenue Chapter of the Revised Statutes, which contains this clause (in substance): "If there be no personal property which the sheriff can distrain for taxes due (he) may levy on any real estate belonging to such delinquent . . . and sell so much thereof for cash in hand as will pay the taxes due and his commission, in the same manner as lands are sold

¹⁷ See Act of Feb. 28, 1835, Loughb. p. 398.

¹⁸ *Ibid.* p. 229, Secs, 5, 6, 7. A similar law was passed March 10, 1843.

¹⁹ *Bishop v. Lovan*, 4 B. M. It is a wonder how any taxes at all were collected from owners having no distrainable goods during the fifty years

in which this system was in force. However, the Auditor's Agent Act of Feb. 7, 1845 (Sess. Acts, p. 31), gives a substantial power of sale, and under Act of Feb. 27, 1849 (Sess. Acts, p. 36), these sales are to be advertised and made at auction.

under execution, except the land need not be valued."²⁰ Two years, with a saving to infants and married women, but only five years in all to persons of unsound mind, is given in which the land might be redeemed with rather moderate interest and damages. The sheriff is to make out a certificate to the purchaser and a report to the clerk.

But the distinction made by the Revised Statutes, according to which the Auditor, not the sheriff, is to handle the estate of non-residents, is left untouched. In 1873 the General Statutes were passed, and the act of 1872 is embodied in them, with the further modifications: *first*, after the words "real estate belonging to" the words "or listed by" (the delinquent, etc.) are added, making the levy a proceeding *in rem*; *second*, the lands of non-residents are to be dealt with like those of residents,²¹ the special provisions about the former being left out.

The directions of the laws of 1872 and 1873 look plain enough, but it is doubtful whether in any case they were pursued with sufficient exactness to give the purchaser a good title. Meanwhile the Court of Appeals receded²² from its former position, that a tax deed made by a sworn officer furnishes *prima facie* proof of every thing which that officer ought to have done, and bidding at tax sales came to an end; the Commonwealth had to bid in every thing that was offered, and was no better off than before the act of 1872.

This called forth the two Auditor's Agents' acts of 1880 and 1882 respectively, under which these agents were authorized to advertise and sell at auction for cash, without redemption, the lands which the State had bought at the sheriff's sales, and directing the Auditor to give a deed to the purchaser, who was then to have a good title notwithstanding any defects in the proceedings leading to the first purchase by the State. These laws were, as we have shown before, declared void.²³ It would have been easy to provide a valid sale for the old tax, treating it throughout as still unpaid; for

²⁰ Sess. Acts, 1871-72, p. 85.

²¹ Gen. Stat. (original edition), Ch. 92, Art. X, Sec. 14.

²² Helm v. Paine, MS. Op. (1879-

80) of Summer Term, 1879.

²³ However, under color of these acts, large sums of back taxes were collected.

then it would only have been necessary to conduct carefully the new proceeding; but the acts proceeded on the theory that the State already owned the lands to be sold, when in fact, by reason of the defective former proceedings, it did not own them, and of course could not sell what it did not own.

NOTE I.—The writer has not found, either in reported cases or elsewhere, disputes arising over the sale of Kentucky lands under the tax laws of Virginia before the separation of the States.

NOTE II.—There never has been a *valid* law in Kentucky by which (as in Virginia and West Virginia) the true owner could lose his land by not paying the taxes, as long as the taxes were paid to the State by anybody else.

SEC. 40. LOCAL TAXES. There is no general law by which either the counties, cities, or towns of Kentucky are authorized to levy taxes, except that the "county levy," a poll tax on male adults of not more than \$3.00 a year, may be levied by each County Court.¹ This is a Virginia survival; those liable to the county levy are still known as "tithables." Most counties are now authorized by special act to levy an *ad valorem tax*, which, unless the contrary appears, must be assessed on every thing that is subject to State revenue, and is collected by the sheriff along with and by the same methods as the latter.² In most cases the taxing power is confided to the full County or Levy Court, composed of the presiding judge and all the justices; but the justices within a city which does not help to pay the county tax may be excluded. A few years ago a special act for Boyd County authorized its people to elect a special Board of County Commissioners to raise taxes and administer the local business. By far the greatest part of such county taxes result from railroad subscriptions voted by the people.

In Jefferson County the country justices in the Levy Court attend to roads, bridges, etc., and the poor of the county outside of Louisville, while the common concerns of "city and county," under an act of 1888, are intrusted to a Board of Commissioners made up of five delegates of the City

¹ Gen. Stat., Ch. 27.

² Act of March 17, 1876; see B. and F. ed. Gen. Stat., p. 335.

Council and two members chosen by the country justices from their own number.

The city and town charters differ widely both in the limit put upon municipal taxation and in the methods of levying, assessing, and collecting. A large part of the income of cities and towns is derived from license taxes, which are fixed by the local body within limits prescribed by the charter. A license ordinance disregarding either the upper or the lower limit is void.⁴

A short abstract may here be given of the Louisville tax law: The original act was passed May 12, 1884,⁵ and has since been amended, as defects appeared in its workings.

The city taxes are threefold: *ad valorem*, license, and poll; the last named is \$2.00 a year on every male adult. The *ad valorem* yearly tax is fixed in every month of December by the levy ordinance of the General Council, at or below the following rates on each \$100 in value: for "city proper," 85 cents; sinking fund, 40 cents; schools, 33½ cents (these two items can not be lowered); reconstruction of carriage ways, 26 cents (original construction and all sidewalk construction being done at the cost of abutters); street cleaning, repairing, and footways, 30 cents; House of Refuge, 5 cents; cleaning and repairing sewers, 2 cents; bonds under ordinance of 1883, 12 cents; certain railroad subscriptions, originally 30½ cents, of which 15 cents are no longer needed. Though on the face of the act this appears to cover the whole subject, the Court of Appeals has held that these provisions do not repeal those of the city charter of 1870, by which the council may submit a loan ordinance to the people, providing for a bond tax aside from the ordinary city taxes.⁶ They were, however, repealed expressly in 1890. Twenty cents may be levied for sewers under the last amendment; but it is not clear whether once only or in every year.

It having been decided in 1882 that a levy ordinance was

⁴ *Kniper v. City of Louisville*, 7 Bush, 599.

⁵ Chapter 1458 of the Sess. Acts of 1883-84, Vol. II, p. 1260. The amendments were passed May 8 and 11,

1886, and April 20, 1888; see Sess. Acts, 1885-86, Vol. II, pp. 511 and 915, and 1887-88, Vol. III, p. 394.

⁶ *Frantz v. Jacob*, 11 Ky. Law Reporter, 55.

void because its publication demanded by the charter took place on Sunday,⁷ a section was added which fixed the rates in case no valid levy ordinance was passed. This section, among other things, put the tax for certain railroad subscriptions at "thirty cents as long as said taxes are needed." In December, 1886, the council failed to pass its levy ordinance, and the question arose on the validity of this item. The Court of Appeals held,⁸ that as long as any bonds issued for those subscriptions were not paid off the tax was needed, and that it was the duty of the assessor to put it upon the tax bills for the year.

The law next enumerates what shall be subject to the tax, namely, land and improvements, and a very few kinds of personalty, among them neither merchandise nor machinery. It subjects "investments" to only two of the rates (that for schools and that for certain railroad bonds), and closely defines these investments; and mercantile or tradesmen's bills and money deposited on call are not among them. (But an ordinance approved by the people, which subjects investments to a tax in aid of a new bond issue, has been sustained as valid.) It also defines what property is exempt, mainly by reference to the State Revenue Law. The closing section of the first article regulates license taxes; this section has since been wholly recast.

The second article treats of assessments. The valuation of land and improvements is made by the assessor; that of personalty and investments by the oath of the owner. This article also provides for a revisory board, which is made up of three citizens annually elected by the Board of Aldermen. These meet at a named place (the assessor's office) and a named time (November 15th to 30th of each year) to hear complaints of over- or undervaluations. As the assessments of former years had been thrown out because the former appeal board did not give the notice of its sittings in proper form, and the Court of Appeals had, as to city taxes, declared a hearing before such a board necessary,⁹ it was thought best to

⁷ Ormsby v. City of Louisville, 79 Ky. 53.
Ky. 197.

⁹ Ormsby v. City, 79 Ky. 197; City v. Cochran, 82 Ky. 15.

⁸ City of Louisville v. Murphy, 86

put this notice in the law. But no valuation can be raised without actual notice to the owner.

The next article, which speaks of arrears, has spent its force. The fourth article introduces a new system of collection which has proved effective; its leading or main feature is the absence of all ministerial sales of the land. A sliding discount is allowed for payments made more than a month before the day (May 1st) when the tax falls due; in April the net amount is paid; half a per cent more in each succeeding month, being no more than the usual rate of interest; but the "Receiver of City Taxes" is directed to actually collect the taxes. In May and June he sends out letters, in July he returns his first delinquent list to the Clerk of the Board of Councilmen, who makes out formal warrants of distraint on each unpaid tax bill, and from August 21st to October 31st these warrants are levied and collected, together with a commission to the Receiver. On the 1st of November the Receiver hands his reduced list over to another clerk, who makes out garnishment notices against the tenants of delinquent land owners, the rent on any parcel being subjected to the aggregate tax on all parcels. Finally, on the succeeding first day of May another delinquent list of the still unpaid bills against lands and improvements is made by the Receiver and turned over to the City Attorney, whose duty it is without delay, by himself or assistant, to bring suits in equity, framed in *all* respects like suits on mortgages, including in one suit the arrears for all years and on all parcels against the same owner. There is a provision to guard the land of infants from being sacrificed by not allowing it to be sold for less than two thirds of its appraised value on any judgment for taxes and costs only. Guardians and other trustees and agents of non-resident owners are bound to pay current taxes out of income. The object of the whole scheme is to collect city taxes pretty much like debts are collected, as the old plan of frightening the property owner into payment by a threat of selling his houses and lots for a song had proved itself altogether unsuccessful.

New precautions are also taken against loss by irregularity.

First, should the "Board of Equalization" (so the appeal board is styled) fail to be lawfully "made up" or to meet in any one year, the taxes shall not thereby become void; but when any tax delinquent in proceedings against him raises the point, the proceedings shall be suspended till the board can be organized, meet, and act on the objector's complaint, and shall then again proceed. *Second*, the city tax for any year is made a lien, as of the first of September preceding that year; and this lien is to stand good, if the original levy or assessment should fail to be binding, for any tax that may thereafter be imposed under a curative act. (Amendment of 1886.)

A section of the last article provides for an Assistant City Attorney, who is to be the soul of the whole system, as the suits for arrears, of which there must be a great number, have to be brought with all the fullness and preparation of other chancery suits, and the additional trouble of setting out fully in pleading all the facts which make out the liability and lien for the tax, which is more delicate work than the ordinary pleading on a mortgage or vendor's lien. The descriptions of lots must be such as a purchaser at chancery sale has a right to demand, but the city assessment maps render this task comparatively easy.

The right to bring suits for city taxes is also given in the charters of Covington, Newport, and several other cities.

The only general law for local taxation is that part of the school laws of May 12, 1884, and April 7, 1886, which authorizes any school district in the State, upon the application of its school trustee, once a year to vote on the question of a tax, not exceeding twenty-five cents on the one hundred dollars in value, to be spent on the school of the district in addition to the quota of the State school fund. In deciding this question, widows, spinsters, and aliens owning taxable property or having children of school age have the right to vote.¹⁰ All the cities and some of the larger towns have voted their school tax for the establishment of graded schools under special acts.

The question has been raised several times whether a gen-

¹⁰ Bul. and Fel. edition Gen. Stat., p. 1145.

eral power given by charter to a city council to tax personal property included choses in action. In a charter granted in 1831 the words "such real and personal estate as the council may designate" were construed as not reaching choses in action, as these were not in 1831 subject to State revenue, though a charter amendment re-enacting the same words had been enacted after the State had begun to tax them.¹¹ However, the same construction was given to two other charters containing the same words "real and personal estates," enacted while the State was assessing every thing for its own purposes.¹² But where a charter amendment extends the power of the city over "all real, personal, and mixed estate," it was thought that choses in action were covered, and this conclusion was strengthened by the words "subject to taxation by the city under the laws of the State," and by the circumstance that a previous tax law for the same city spoke expressly of choses in action.¹³

SEC. 41. ASSESSMENTS. The cities and towns of the State have, from early times, been empowered by their several charters to lay assessments for all the usual improvements, such as grading and paving streets and alleys, and for separately paving the sidewalks, digging wells and fire-cisterns, but very seldom (as is done in New York) for the cost of opening or of widening a street, or for the construction of sewers. The council or board of trustees of the city or town having "ordained" the improvement, a contract is made by the mayor, which is approved by the council, the work is given out, and when finished is reported on by the engineer of the city or town; the governing body then accepts the work and "apportions" the cost on the abutters. In nearly all the cities and towns of the State warrants are then issued in favor of the contractor against the several abutters; and these warrants can only be enforced by suit, which is generally a suit in equity, to which all the abutters who are in arrears are made

¹¹ Johnson v. City of Lexington, 14 B. M. 521 (1853). ning & Speed, 1 Bush, 381.

¹² City of Covington v. Powell, 2 Met. 226; City of Louisville v. Hen- ¹³ City of Newport v. Ringo's ex'r, 87 Ky. 635.

parties. Should it turn out that the proceedings are so far defective that the contractor gains no valid lien on these lots, the city is, under most of these statutes, bound for the contract price. The intersections are, under some charters, paid for from the treasury, under others the cost of the intersections is apportioned with the rest of the work. As to the carriage way, the rule is to charge the abutters only with its first construction; but in case of sidewalks, also with each re-construction that may thereafter be needed.

The apportionment is sometimes by the front foot (always so as to sidewalks), in some cases by the square contents of the adjoining lots within the "quarter squares" bounding upon the improvement. The charter of 1870 introduced this rule in Louisville, and has been enlarged since by amendment so as to meet all emergencies.

The details of statute, and decisions thereunder, are given in a note.¹

¹ A street or alley is to be improved the first time at the "cost of the owners of lots in each $\frac{1}{4}$ of a square, to be equally apportioned . . . according to the number of square feet owned, . . . except that corner lots (say 30 feet front and extending back as . . . by ordinance) shall pay 25 per cent more, etc. When the territory contiguous . . . is not defined into squares by principal streets, the ordinance . . . shall state the depth on both sides fronting said improvement to be assessed." (Act March 24, 1882, Sec. 2, Louisville City Code, p. 499, re-enacted from an act of 1872.) Without the second clause, which is not in the charter of 1870, a street not part of a continuous outline of principal streets could not be improved at the cost of abutters, there being no "square." (Caldwell v. Rupert, 10 Bush, 179.) The Court of Appeals in Giles v. Schmelz, 12 Bush, 491, expounds above rule with the aid of a

diagram. Four "squares" are given, divided by the crossing streets A and B. "A" runs east and west, "B" north and south. All the squares front 400 feet on A street, but the two northern squares front 320 feet on B street, the southwest square 400 feet on B, the southeast square 360 feet on B street. The court says: "Assess the two fourths of squares on opposite sides and contiguous to the improvement. Thus, if A street . . . is improved from 1 to 2 (two blocks), the assessment will extend each way to the . . . dotted lines, etc. (these are 160 feet north of A street, 200 feet south of it on the west, 180 feet south of it on the east). When B street is improved, the assessment will be extended on each side to the . . . dotted lines, and $\frac{3}{4}$ of each square will have been assessed, etc., and $\frac{1}{4}$ not at all, and when all the streets bounding the squares are improved, each $\frac{1}{4}$ will have been twice assessed." But where

In 1841 the averment that the order of the council was "duly made" was held sufficient, though the charter required a unanimous vote.² Though now great fullness in pleading statutory rights is required, it is enough to say that an ordinance was passed without stating the steps by which it passed.³ On the other hand, a denial "that there is such an ordinance," or a plea generally of *nul tiel record* to the council proceedings has been disregarded; the traverse should be as definite as the averment.⁴

The statutes conferring on the governing body the power to charge the abutters have been construed "most strictly against those asserting claims under them."⁵ An authority to the town trustees to pave a named street was held not well executed by paving part of it;⁶ nor can a council accept part of the work or-

part of an alley within a square had, before the charter of 1870, been improved at the cost of those abutting on it, they were held not liable to pay for paving the rest, and doubt is expressed whether the "four fourths," in short, the whole square can be made to pay for an alley not running all through it. (Beck v. Obst, 12 Bush, 268.) When a street did not bound regular squares, and the next street west of it, already improved, was 295 feet distant, the council ordered a depth of 147½ feet to the west, but assessed a depth of 250 feet eastward, with a view to squares to be laid out thereafter of 500 feet in depth; the Court of Appeals reduced the apportionment on the eastern lots to one half of the whole. (Preston v. Roberts, 12 Bush, 570, 584.) Whether a public way is a street or alley is not concluded because the council named it a street; a width of only 30 feet, and running up against another alley, stamp it as alley. (Reed v. Novin, 10 Ky. Law Rep. 406; Superior Court.) Curbing goes with the sidewalk and is apportioned by

frontage, not by area. (Joyes v. Shadburn, 10 Ky. Law Rep. 493.)

² City of Louisville v. Hyatt, 2 B. M. 180. Here also the contract was benignly construed "per square yard," being interpreted to mean "per cubic yard," largely enhancing the price and thus the tax burden.

³ Preston v. Roberts, 12 Bush, 570. Though ordinances for street improvement have to be passed otherwise than other ordinances—fourteen days to intervene between the passage in each board—but the manner in which an ordinance was published, where publication is required, must be pleaded in detail; "duly published" is not enough.

⁴ *Ibid.*

⁵ City of Henderson v. Lambert, 14 Bush, 24.

⁶ Town of Bowling Green v. Hobson, 3 B. M. 480. There is no power to pave as a street a strip of land never dedicated or condemned as such, at least not at the cost of the lot owners. (James' adm'r v. City of Paducah, MS. Op., 1881; see Lou. City Code, p. 517.)

dered, and collect the cost from the abutters before finishing the whole.⁷ And the forms imposed on the local body must be observed; thus, where the charter required an ordinance for street improvement to be referred to the Street Committee, the omission makes the apportionment warrants void.⁸ Yet regularity is so far presumed, that where unanimity was required of all the councilmen and of the mayor who presided, and the journal signed by the mayor showed the vote of all the councilmen on the passage of the ordinance, and that it passed, the mayor's assent is implied, because without it such an ordinance could not have been passed.⁹

The proceeding is an exercise of the sovereign taxing power, no part of which the governing body intrusted with it by the State can delegate to a subordinate, such as an engineer, by leaving to him how much of a street shall be paved or to what level it shall be raised, and such delegation destroys the liability of the lot owners.¹⁰

In demanding that all steps toward ordering and accepting the work and apportioning the cost should appear on the corporate records, the Kentucky decisions are in harmony with those elsewhere, not on assessments only, but on all municipal action. Where the contract or the report does not pursue the ordinance, or where the improvement is put elsewhere than on the "way" named in the ordinance, or upon

⁷ *City of Henderson v. Lambert*, 14 Bush, 24.

⁸ *Worthington v. City of Covington*, 82 Ky. 265.

⁹ *City of Lexington v. Headley*, 5 Bush, 508.

¹⁰ *Hydes & Goose v. Joyes*, 4 Bush, 446. (In harmony with Missouri and other decisions; approved in *Dillon on Mun. Corp.*, somewhat narrowed in its general application by *Covington v. Boyle*, 6 Bush, 204, and by *Frantz v. Jacob* in 11 Ky. Law Rep.) *City of Henderson v. Brown*, 7 Ky. Law Rep. 265. But where the ordinance fixes the width of the strip along a

street that is to be paved, the city engineer may locate that strip and need not place it at the middle of the street. (*Nevin v. Roach*, 86 Ky. 492.) And where the *quasi* judicial task of accepting the work after notice to the lot owners, and hearing complaints from them, is put upon the city engineer, he can not delegate it to an assistant—*Super. Ct. in Harris v. Zable*, May 16, 1883, Lou. City Code, p. 514, following the reasoning in *Preston v. Roberts*, 12 Bush, 570. Under the act for Louisville of 1882 (see same Code, p. 508) the hearing may be given by the engineer, his deputy or assistant.

land not dedicated before the order to improve it, the lot owners are not liable,¹¹ though it is said that where the corporate record shows an acceptance of the work the lot owners will not be heard to plead and prove its defectiveness, unless they can show fraud or collusion.¹² Yet in a large number of cases at Louisville, where ordinance and contract called for paving streets, and work was accepted as such on the engineer's report, but the work as shown by pleading and proof was not paving at all, but macadamizing, the Court of Appeals took the burden off the lot owners and threw it upon the city.¹³

Most of the statutes provide for a joint suit against all the lot owners in arrear, and empower the court to correct the apportionment among them. This was done in the leading case of *City of Lexington v. McQuillan's heirs* in 1840, and again in 1877;¹⁴ but it will not often be practicable for the court to do more than reduce the charges against those who have been assessed too high, so that the contractor or the city will have to lose the deficit on those who were assessed too low.

NOTE.—Consult on this subject Sections 43, 46, 47, 48.

SEC. 42. REMEDIES AGAINST UNLAWFUL TAXATION. The Kentucky Court of Appeals was among the first to lay down the doctrine, since taken up and maintained by the Supreme Court of the United States, that equity will not interfere by injunction to stop the collection of a wholly unauthorized tax, unless there be a plain ground of equitable

¹¹ *Murray v. Tucker*, 10 Bush, 240, (self evident).

¹² *Ibid.* and *Manley v. Trustees of Lagrange*, 7 Ky. Law Rep. 825; acceptance by the governing body conclusive on the lot owners.

¹³ *City of Louisville v. Ruth*, and other cases, MS. Op. in and about 1860 and 1861. That part of the work contracted for was not done at all is a defense *pro tanto*. See *Dulaney v. Bowman*, MS. Op., Jan. 1875, quoted

in Lou. City Code, pp. 540, 544.

¹⁴ 8 Dana, 518 (1840). *Preston v. Roberts*, *ubi supra*, reduces the assessment on some of the lot owners; the court being afterward, in *Loeser v. Redd*, 14 Bush, 18, called upon to adjudge the deficit against the others, declared itself incompetent to do so. See also, on corrections of errors in apportionments at Louisville, *Haycraft v. Selvage*, 10 Bush, 696.

jurisdiction aside of the illegality.¹ But, after a long interval and upon precedents from other States, the court receded from this position, first in some cases where the point was not raised, then at the suit of railroads,² and at last in a plain case of a tax on personalty to be satisfied by distraint,³ the ground of illegality being that the personalty was assessed in the county of its *situs* after being listed by the owner at his home. The rule is now firmly established; not only a sale of lands, but a distraint or other compulsory process will be stopped by injunction, if the tax on any ground is not due; and the court sustains, if the tax is not due, a bill to quiet the title to land on which the tax, if lawful, would be a lien. This rule has been applied repeatedly where banks and railroad companies were seeking to maintain their tax exemptions or commutations.⁴

The courts have also, on their own responsibility, enjoined the collecting officers from distraining the rolling stock or fuel of railroads, in fact, any articles that are used in transportation or in the freight and passenger traffic of a railroad; and the same rule was applied to a company supplying a city with water,⁵ all on the ground that the public interest would suffer by stopping the work of such a corporation. The taxes of railroads can only be enforced by suit; how a water company owing taxes could be compelled to pay them has been left unanswered by the latest deliverance of the Court of Appeals.⁶

In one case⁷ the court went further and approved a per-

¹ *Gwathmey v. Trustees of Louisville*, 1 A. K. Mar. 554 (1819). The right of a tax-payer to enjoin the issue of municipal bonds, which would lead to the imposition of a municipal tax, is fully conceded in *Frantz v. Jacob*, 11 Ky. Law Reporter, 55.

² *Louisv. & Nashville R. R. Co. v. Warren County*, 5 Bush, 247, where the court went so far as to intimate (which is hardly good law) that the remedy in equity would lie even where the County Court could have

relieved by reducing the assessment.

³ *Gates v. Barrett*, 79 Ky. 295.

⁴ *Franklin County Court v. The Banks, etc.*, 87 Ky. 370.

⁵ *Hamilton v. Louisville Water Company*, 81 Ky. 517.

⁶ *Commonwealth v. Louisville Water Company*, 11 Ky. Law Rep. 414.

⁷ *Kenton Insurance Company v. City of Covington*, 86 Ky. 213 (on cross-appeal). It seems the question was not raised whether an attempt to collect a lawful tax by unlawful means justifies an injunction.

petual injunction against a tax distraint on the ground that, though the tax was legally due, the distraint at the time when it was attempted was unauthorized.

But in an unreported opinion, delivered November 15, 1877, where an owner of cattle sought to enjoin a distraint on the ground that the supervisors, who had increased his assessment, had failed to make the proper record of their proceedings, the court held: "Equity will not enjoin the collection of a tax upon the mere ground of irregularity in the assessment."⁸

Where taxes have been paid under the fear of summary process or of penalties the payment is not deemed voluntary, and whether the mistake was one of fact or of law the money may be recovered back—of course only from a municipal body,⁹ as the State can not be sued. The distinction between mistakes of law and fact seems to have been lost in Kentucky.¹⁰ It was held in one case, in 1888, that the payment is voluntary where the tax, like one assessed against a railroad company, can not be enforced by summary process, but only by suit;¹¹ but in a case decided a few weeks later (which, however, actually went off in favor of the city because the tax was held to be lawful) the law about recovering back money paid for an unauthorized tax was laid down in the most general words without any such distinction.¹²

In no reported case has it been tried to recover back money paid for an ordinary tax authorized by law, but levied or assessed by the city authorities in an ineffectual manner;

⁸ *Rennick v. Curry*, inserted among decisions of 1880, 3 Ky. Law Rep. 156; opinion by Chief Justice Lindsay. The editors say in a note that they insert the case because the point stated above had become important.

⁹ *City of Louisville v. Anderson*, 79 Ky. 334 (city tax paid for farm lands unconstitutionally thrown within the city limits). *Fechheimer Brothers & Co. v. City of Louisville*, 84 Ky. 306 (license unconstitutionally extorted).

¹⁰ *Brockman v. Underwood*, 4 Dana,

310. Here the Kentucky authorities diverge widely from those of most of the States.

¹¹ *Louisville & Nashville Railroad Company v. Hopkins County*, 79 Ky. 605, would meet the case of city taxes in Louisville or Covington paid after the time for distraining elapsed.

¹² *City of Newport v. Ringo's ex'x*, 87 Ky. 635, following *City of Louisville v. Henning & Speed*, 1 Bush, 881.

nor is it likely that a court would ever sustain such an attempt, for the city might "in honor and good conscience" retain money thus collected, and the test applied where a return of the money was adjudged would not apply.

But a somewhat similar case came up on an "assessment" for improving a street. The ordinance for that purpose was void. The plaintiff, not knowing the facts which rendered it void, paid his share of the cost without objection. Some years afterward, learning the circumstances, he brought suit to recover back the amount paid. A judgment in his favor, rendered by default, was reversed on the ground that his own petition indicated that his lot was benefited by the improvement, and that, though he could not have been forced to pay, still he could not "in honor and conscience" ask a return of his money.¹³

¹³City of Louisville v. Zanone, 1 Met. 151. That the apportionment warrant could not have been collect-

ed without suit is not noticed in the opinion.

CHAPTER VII.

MUNICIPAL CORPORATIONS.

SEC. 43. Liability on Contracts.

SEC. 44. Contracts of *quasi* Corporations.

SEC. 45. Tort and Usurpation.

SEC. 46. Streets and Roads.

SEC. 47. Municipal Records.

SECTION 43. LIABILITY ON CONTRACTS. There is no statute applying alike to any two or more cities and towns.¹ The governing body of a "city" is called a Council; in Louisville the "General Council," composed of the Board of Aldermen and Board of Councilmen, and the Mayor has a veto on all ordinances and resolutions; in Lexington, Frankfort, and some other cities, it is the "Mayor and Council," the former sitting as presiding officer among the latter, while a "Board of Trustees" governs the town, and its chairman is the executive officer. There is no sharp line of distinction between the powers of a city council and those of a town board, though perhaps more would be presumed in favor to the former. A town, when turned by statute into a city, remains liable for its former debts, the inhabitants being considered the true debtors.²

The question of contract liability oftener raised than any

¹ A chapter on Towns, 107 of the Gen. Stat., is founded on acts of 1796 and 1800 (see *infra*, Sec. 46), the former as to the "laying out" of towns, the latter as to their government. The towns of Lexington, Louisville, Frankfort, Washington (*i. e.* Maysville), Danville, Paris, Georgetown, Springfield, Jeffersontown, Cynthiana, Bardstown, Middletown, Williamsville and Newton, and Harrods-

burg; that is, all the then inhabited towns were exempted in the latter act from its operation, and others as they were established. The provisions of the older act as to the power of the trustees over streets were, however, quoted by the Court of Appeals in 1846 as applicable to Hopkinsville. See *infra*, Sec. 44, n. 1.

² Maysville v. Shultz, 3 Dana, 10.

other is this: whether a city or town can be held for the cost of an improvement which, under the charter, would in the first instance fall on the abutting lot owners, or on some district of greater or lesser extent. And here the courts have gone very far in imposing on the municipal body a liability which it could not lawfully undergo by express contract. The leading case³ came up on a second appeal in 1844. The "Mayor and Council" of Louisville had, in accordance with the charter, contracted with the undertakers for the grading and paving of certain streets: these undertakers to look to the lot owners for payment. It turned out that the ordinances for making the improvements had not been passed with the unanimity required by the charter, and for this reason the lot owners were discharged. Should the city pay the price of the work? When the undertakers agreed to look to the lot owners, they expected of course to receive enforceable warrants against them, and the city stood in the position of an indorser. It was the neglect and fault of the city authorities that these warrants were invalid. But was this implied guarantee within the powers granted to the Mayor and Council?⁴ They had no power to levy a tax for the first construction of streets; but street-making is said to be an "inherent corporate right," hence the contract of the governing body for improving streets will be enforced as far as to render judgment, though if no funds applicable thereto should be ready the creditor will be turned off empty handed. This decision was followed in a number of cases from Louisville. The clause in the charter of 1851, which expressly forbids the council from incurring on behalf of the city any liability beyond the current year, was pleaded in defense in some of these, but in vain, and the city was adjudged to pay *hundreds of thousands*; these judgments could only be met by the sale of city bonds authorized by special laws for that purpose.

The charter of 1870 said expressly, "In no event shall the

³City of Louisville v. Hyatt, 5 Bush, 199. Followed upon like facts in Kaye v. Hall, 18 B. M. 455.

⁴See Sec. 41, n. 9; also James'

adm'r v. City of Paducah, MS. Op. 1881, referred to in Lou. City Code, p. 517, and Kearney v. City of Covington, 1 Metc. 389.

city be liable for such improvements without having the right to enforce it against the property, etc.," and again prohibited the imposition of liability (unless by vote of the people) beyond the revenue of the current year. With these provisions in force, the city of Louisville was held liable for so much of the cost of a sidewalk as was assessed against the owners of a cemetery, because no lien could be enforced against such property.⁵ And where, before the amendment of 1872, which authorizes an apportionment for streets not bounding a *square*, the improvement of such a street had been ordered, and the contractor was defeated in his suit against the lot owners, the city was held liable on the ground that in such a case the city had no power to order the improvement at the cost of the abutters.⁶ But when the City Council has the power (f. i., after the act of 1872 to improve a street not bounding a square), but proceeded improperly (f. i., failed to name the depth for apportionment on one side of the street), the city is discharged by the effect of the above clause.⁷

The doctrine of implied municipal power was carried still further in a late decision of the Court of Appeals, sustaining a proposed issue of bonds by the city of Louisville, ordered by the council with the approval of the people, under a clause of the charter allowing such bond issues for appropriate municipal objects. The purposes named were, in the main, reconstruction of public ways, street repairs, sewers, bridges. Now the charter provided that each of these objects of expense should be met either by a tax on a district of the city for the improvements within it or by an apportionment on the abutters. But the court held that the objects were nevertheless appropriate, and within the power granted to the council to incur a debt beyond the year's revenue, with the approval of a popular vote.⁸

But in matters outside of municipal duty in the field of

⁵ Louisville v. Nevin, 10 Bush, 549.

⁶ Caldwell v. Rupert, 10 Bush, 179, 184.

⁷ Craycraft v. Selvage, 10 Bush, 696, 704. The clause relieving the city

has been repealed (Acts of 1886, —), and very properly, as the cost of improvements was very much increased by the fear of ultimate loss.

⁸ Frantz v. Jacob, 11 Ky. L. R. 55.

action of the Commonwealth, the governing body is not allowed to extend its powers beyond the charter. It can not spend nor contract to spend money for the arrest of a fugitive felon, even of an embezzler of city funds, though similar action has been sustained in other States.⁹

SEC. 44. CONTRACTS OF QUASI MUNICIPAL BODIES. The contracting power of a county (which is hardly to be called a corporation), or of a school district (the trustee or trustees of which are expressly declared a corporation¹), is narrowly limited, and not expanded by construction like that of a city or town. The magistrates' district, which corresponds to a Northern township, has under the general law neither powers nor organs to wield them, unless when it is authorized by some special act to vote on a road subscription.

The county levy (see *supra*, Section 40) is made generally to defray the expense of the court-house and jail, and of roads and bridges, of the poor-house, and of indexing or copying record books, aside of what may be authorized from time to time by special acts. The mode of satisfying claims against the county is regulated by Chapter 27 of the General Statutes. "The claims are first considered and allowed by the court of levy, and a list of these claims, etc., is given to the sheriff, whose duty it becomes, on collection of the levy, to pay the several amounts to the persons designated, etc. In default of payment the creditor . . . is given a remedy against the sheriff and his sureties in the county levy bonds."² In this way of conducting business the county does not come forward at all in a corporate character.

But where the county under special authority issues its bonds,

⁹ Patton v. Stephens, 14 Bush, 324. That the governing body can not spend money in seeking an enlargement of its municipal powers (Henderson v. Covington, 14 Bush, 312) is in full accordance with English and American authorities.

¹ In the School Act of May 12, 1884 (inserted as Ch. 96^a in B. and F. ed. of 1887 of Gen. Stat.), Art. XII, Sec.

6, the power to receive subscriptions is given to the corporate body, but not power to bind itself by contract, at least not expressly. The "Board of Trustees of the Public Schools of Louisville" and many other boards of graded city schools are incorporated by local laws.

² Elliott v. Kitchen, 14 Ky. 289, 293.

made payable to order or bearer, it assumes a corporate personality, and becomes bound as a corporate debtor to the holder of the bond. The holder of such a bond need not look to the sheriff, but can recover thereon against the county irrespective of the sheriff's doings, as he would on a city bond against a city.³

When the county is thus clothed with corporate power, it can, like a private corporation, bind itself by the parol contracts of its agent made in the natural course of business. Thus, where a special act ordered a vote of the county on a railroad subscription, and the County Judge was to subscribe in the county's name, it became his duty to defend a *mandamus* taken out against him, and his employment of a lawyer for that purpose was binding upon the county:⁴ *a fortiori*, where the Levy Court employed a lawyer to resist a suit on a subscription, by order entered on its minutes.⁵

By Chapter 86 of the General Statutes the County Court is empowered to establish and conduct a poor-house in each county, and by its tenth section the "court" (that is, the full bench) in term time, or the judge in vacation, shall admit poor persons into it, and "cause medical aid to be employed at the public expense for such poor of the county as he may deem proper." It was held that a physician who, "at the request of the County Judge, ratified by said justices" (*i. e.*, by an order of the Levy Court), attended on a colored smallpox patient, can claim his whole fee from the county, to be raised by a sufficient levy, and can not be put off on an insufficient "negro fund."⁶

³ *Ibid.* An act authorizing a county to issue bonds for a railroad subscription was said to make it *ad hoc* a quasi private corporation. See next case.

⁴ *Washington Co. Court v. Thompson*, 13 Bush, 234, 241. "The — County Court" is often used as the corporate name. In this name a county was allowed, as the owner of a public building, to sue for its wanton destruction. *Christian County Court v. Rankin & Tharp*, 2 Duv. 503, or for injury to a county road.

⁵ *Garrard County Court v. McKee*,

11 Bush, 234.

⁶ *Rodman v. Justices Larue County*, 8 Bush, 144. *Mandamus* was formerly the ordinary means of compelling the Levy Court to allow a claim. But by the G. St., Ch. 27, Art. III, Sec. 11, an appeal is given to the Circuit Court from an order rejecting in whole or in part a claim for \$20 or upward; the appeal under Sec. 729 of C. P. to be taken in 60 days. *Ditto v. Meade*, 14 Bush, 213. The C. P., in Sec. 51, speaks of a county as a corporation.

But neither this clause, nor the powers given to the County Judge for vaccinating poor people "to stop the spread of smallpox" by Chapter 94 of the Revised Statutes (now Chapter 102 of General Statutes, but much more specific), would authorize either judge or court to employ a physician at the public expense to treat generally the smallpox patients of a neighborhood.⁷

The few reported cases upon contracts made on behalf of common schools all bear against the corporate power to contract. Thus, the salary of a common school teacher in the hands of the County School Commissioner can not be garnisheed for debt, for the commissioner is an agent of the State, and to summon him as a garnishee is to sue the State.⁸ Where a teacher was improperly dismissed before the end of his term, he was allowed to sue the trustees who dismissed him in tort, instead of suing the district for his wages.⁹ It seems that, in case of a defalcation by a county commissioner, the teachers of the several districts would have to sue him on his bond, each for his or her share of the State school fund remaining in his hands.¹⁰ It is not certain whether a teacher, or one furnishing room or supplies to a common school district, other than those working under special charters, can in any case sue the incorporated trustees. Their remedy would probably lie against the officer holding the money to which they are entitled.

SEC. 45. TORT AND USURPATION. There is no statute in Kentucky, like those prevailing in the New England States, which renders the township liable for all injuries arising from ill-kept roads. But the liability of cities and incorporated towns is worked out on common law grounds, from the powers which their charter confers on them over their streets and thoroughfares. And an indictment at common law was said to

⁷ *Pusey v. Meade County Court*, 1 Bush, 217.

⁸ *Tracy v. Hornbuckle*, 8 Bush, 336.

⁹ *Hill & Bergen v. Harris*, 4 Bush, 450. In *Harrison v. Stone*, 4 Bush, 577, a trustee was held personally bound on his promise to turn the *pro*

rata of the State school fund over to a teacher.

¹⁰ See School Act of 1884, B. and F. edition of Gen. Statutes, p. 1139, and *Hammond v. Crawford*, 9 Bush, 75, arising under a similar act.

lie against the trustees of a town, vested with powers over the streets, for not keeping them in order,¹ though the old English method of indicting the inhabitants of the parish for not repairing the roads could not be applied to a Kentucky magisterial precinct, as that has no organs to direct its action. A mandamus lies against the authorities of a city to compel them to keep a street in repair, on the relation of those owning lots and houses upon it, where it appeared that by the wearing away of the street access to the houses became both inconvenient and dangerous, and the houses themselves were threatened with destruction.² It was said that the duty and power of the governing body to improve and repair streets is "legislative," but in some cases the necessity for its exercise is so obvious that the refusal is rather a "determination not to discharge a duty than a mistaken judgment." It then becomes "ministerial," and may be enforced by the courts; but whenever there is room left for discretion, whether to improve a street or not, the courts can neither interfere by mandamus beforehand nor by judgment for damages afterward at the instance of an injured party.³

The most frequent cases of complaint arise from negligence in the construction of public works and in failure to keep the streets in repair, whereby persons traveling along the streets either on foot or on horseback or in vehicles are injured. The rule of decision and measure of damages, as against chartered cities and towns intrusted with the public ways in their midst, is not different in Kentucky from what it is elsewhere in England or America.

But where the work done by the municipality causes damage to the lands, buildings, or other improvements of the citizens, the Kentucky rule is more favorable to the latter

¹ Commonwealth v. Trustees of Hopkinsville, 7 B. M. 38.

² Hammar v. City of Covington, 8 Met. 494. The charter contained the words "The Council — shall have the exclusive control of the streets, etc., and shall cause the same to be kept clean and in repair." The case

follows a Pa. decision in 10 Casey, 296; *Ibid.* 508. Followed in Trustees of Catlettsburg v. Kinner, 13 Bush, 334. In both cases the street had been washed away by the river.

³ City of Henderson v. Sandefer, 11 Bush, 550. It is not easy to draw the line.

than in those States in which the guarantee against the "taking" of private property for public use does not cover also the "injuring" of such property for a like purpose. In a case⁴ already quoted under the head of Constitutional Law, damages were allowed against the city for the injury done to plaintiff by so making a fill in grading the street as to shut off the natural drain of water, and thus submerging her lot during the rainy season, which might have been avoided by running a culvert or sewer through the fill. The other cases already quoted on the constitutional guarantee are referred to by the court. In speaking of the measure of damages the court says: "While no recovery can be had for physicians' bills paid, or the loss of time on the part of the occupants on account of sickness caused by the stagnant water, still these facts may be proven with a view of showing the extent to which the value of the property has been lessened," the recovery to be measured by this depreciation.

The courts of Kentucky follow those of other States in not entertaining any claim for damage arising from the non-performance or ill performance of the powers conferred on the municipal authorities in the preservation of the peace or public safety. As far as such functions are intrusted to a city or town, it acts not as a corporation, but as a political division of the Commonwealth.⁵

A county is not liable for a tort of either omission or commission, though in view of the powers of the Levy Court over roads and bridges the reason on which cities are held liable applies to a county as well.⁶

The courts of equity of Kentucky have gone as far as any in undertaking to restrain by injunction any unlawful assumption of municipal powers, as is shown *supra*, Section 42, in the matter of taxes, at the suit of any owner of taxable property, in restraining a bond issue leading to taxes, or stopping the expenditure of money for purposes *ultra vires*; for instance,

⁴Kemper v. Louisville, 14 Bush, 87. See *supra*, Sec. 15, n. 1.

⁵James' adm'r v. Trustees of Harrodsburg, 85 Ky. 191.

⁶Downing v. Mason County, 87 Ky. 208, based on precedents from other States.

where a council proposes to pay fees for obtaining legislation enlarging its powers, or a reward to have a defaulter arrested.⁷

But twice, and at long intervals, the Court of Appeals has denied an injunction against town authorities attempting to enforce their ordinances by summary proceedings in conflict with the supposed property rights of the complainant (in one case where such action of the town lessened the value of complainant's wharf), and declared that the invalidity of these ordinances, or the higher property rights of the complainant should be first established at law.⁸ An old privileged ferry right was protected by injunction against a city aiding a rival ferry.⁹

SEC. 46. STREETS AND ROADS. The towns and cities of Kentucky were always "laid out" with all the streets, alleys, public places, wharves, etc., traced out and dedicated to the public uses long in advance of population, and additions were made in like manner to the original sites.

An act of 1796¹ re-enacted in the Revised Statutes, and again in the General Statutes, of which it forms Chapter 107, confers power on the County Court to establish a town when deemed of advantage to the public, on the application of the owner of the land on which it is to be laid out. The act followed the plan pursued by the Virginia Legislature in laying out the towns of Lexington, Louisville, Bardstown, Danville, etc. The order of the County Court made upon such application shall vest the land in the trustees appointed by the court "as effectually as if done by an act of the legislature." The land so vested "shall be by them (or a majority, etc.) laid off into convenient streets and lots," and the lots sold at auction, and the proceeds turned over to the owner of the land. Any

⁷ See *supra*, Sec. 43, n. 9, 14 Bush, 812; *Ibid.* 324.

⁸ Trustees of Louisville v. Gray, 1 Litt. 147; Brown v. Trustees of Catlettsburg, 11 Bush, 435.

⁹ Newport v. Taylor's exr's, 16 B. M. 699, 779. Hard to reconcile with Gibbons v. Ogden, 9 Wheaton, 203.

¹ M. and B. Stat., II, p. 1505; Litt.

L. Ky., I, 512. The amendatory act of 1800 (M. and B. 1509; L. L. K. II, 406) has no bearing on the laying out of streets, except in that it orders the town trustees to have the plan of the town recorded. Under the first act as soon as there were fifteen resident lot owners they were to elect the trustees.

additions to the town made by adjoining owners shall be laid off likewise by trustees appointed in like manner.

In a town laid out under this statute or a charter with like provision, the trustees in whom the title is vested can not sell any space which on their plat is covered by streets, alleys, or open public places; if they do so, the town can recover back the land thus sold.²

And when a land owner lays his land out in squares divided by streets and open places, not under the statute or any order of a County Court, but sells lots afterward with reference to the plat, every purchaser has an enforceable right to have these streets and places kept open, not only to himself, but to all the world; and a town afterward organized on the platted land can enforce this right in its corporate capacity.³

When a town is laid out at or near the Ohio or other navigable river, it is presumed to reach to low-water mark, and that the "slip" between the "Front" or "Water" street, as marked on the plat, is reserved as a commons where the towns-folk may draw water from the river; also for "lading and unlading boats, etc."⁴ Nearly all the disputes have arisen about this "slip."

Yet when the town and city had, for forty years after it came under self-government, acquiesced in a sale by the trustees of the strip between "Water Street" and the river, it was held to be estopped from reclaiming it, and from repudiating its contract with the owner to give him a share in the wharfage.⁵

² *Buckner v. Trustees of Augusta*, 1 A. K. Mar. 8; *Kennedy's heirs v. Town of Covington*, 8 Dana, 50; *Trustees of Augusta v. Perkins*, 3 B. M. 437. The town can sell at law without first tendering back the price. (*City of Covington v. McNickles' heirs*, 18 B. M. 384.) The disposition, even if approved by all the citizens, would remain invalid. (*Alves v. Town of Henderson*, 16 B. M. 131, 170.)

³ *Rowan's exr's v. Town of Portland*, 8 B. M. 232. A dedication to the public is not within the statute

of frauds and good without signature (*McKinney v. Griggs*, 5 Bush, 405); but it is (as elsewhere) not good, so as to constitute a municipal highway, till accepted. (*Gedge v. Commonwealth*, 9 Bush, 61.) An ordinance to improve a street would imply an acceptance.

⁴ *Trustees of Maysville v. Boone*, 2 J. J. Mar. 224; *Giltner v. Trustees of Carrollton*, 7 B. M. 680; *City of Louisville v. Bank U. S.*, 3 B. M. 144; *Rowan's exr's v. Portland* (n 3).

⁵ *City of Louisville v. Bank U. S.* n. 4.

The legislative transfer to the trustees, either under the statute or by local act, gives them the soil in the streets as well as in the lots, so as to make the minerals under them corporate property;⁶ and though the fee in a street be in the adjoining lot owners, the possession, with whatever rights belong to it, is in the municipal body.⁷

Though the power of eminent domain may condemn the very franchise which has been obtained through its exercise: a street may be taken for a railroad, or a railroad for a street, or part of the track of one road be condemned to serve for the crossing of another; yet in the absence of clear words to that effect in a statute, it will not be presumed that the power of condemnation for railroad purposes extends to a city street.⁸

As the terms on which strips of land may be condemned for the laying out or widening of streets are different for every city or town of the Commonwealth, they can not be discussed here.

Neither can the law for the laying out or discontinuance of county roads be discussed in its details. It is treated in fifty sections⁹ of the General Statutes, many of which direct the course of proceeding in the County Court before the jury upon an *ad quod damnum* and upon appeal. It is enough to state that the right of way is generally obtained by condemnation; the work along the road is done, and the "metal" put on it, all at the county's expense; the county in its corporate capacity becomes the owner of the road (and so of a bridge), with the right to sue for any trespass.¹⁰

A county road may be established as a convenience of travel, under the first section of the road law, toward so many points as to leave the discretion of the County Court as much as unlimited; but the convenience must not be that of one

⁶ *Trustees of Hawesville v. Hawes' heirs*, 8 Bush, 679. This decision does not interfere with the common law rule, that he who purchases lots with reference to a street laid out by the owner acquires a title to the "middle thread of the way." (*Trustees of Hawesville v. Lander*, 6 Bush, 232.)

⁷ *J., M. & I. R. R. Co. v. Esterle*, 18 Bush, 667, 673.

⁸ *Lou. City Railway Co. v. Central Pass. R. R. Co.*, 87 Ky. 223. *Cornwall v. L. & N. R. R. Co.*; *Ibid.* 72.

⁹ Gen. Stat., Ch. 94, Article 1.

¹⁰ *Lawrence County v. Chattaroi Railroad Co.*, 81 Ky. 225.

party, but that of the public."¹¹ Section 12 allows roads to be run out into the country simply to extend the streets of a city in a straight line as far as one or two miles (according as the city has more or less than 50,000 inhabitants), provided the applicants are willing to pay the cost, the object being evidently to allow suburbs to be laid out which will not be liable to city taxation, and which in the later growth of the city may be absorbed in it. Whether the power of eminent domain can be exercised for such a purpose is not very clear.

NOTE.—As to lapse of time in favor of purprestures, see *infra*, "Limitation of Actions for Land."

SEC. 47. MUNICIPAL RECORDS. The validity and authenticity of these records is oftenest drawn in question in suits upon apportionment warrants, sometimes in cases arising out of ordinary town or city taxes, prosecutions for the breach of by-laws, enforcement of contracts against a city, etc.

The leading principle, that the governing body can only speak through its journal, has been carried in Kentucky to its fullest extent. Where a supposed ordinance is the foundation of the suit, and the journal of the sitting of the council at which it purported to have been passed does not show its passage, it is no ordinance, and a subsequent council can not turn it into one by ordering the old journal to be corrected.¹ Or where the council clerk habitually kept no regular minutes on his journal (though he made short notes on his blotter), but had the ordinances which he thought had been passed by the board printed, and they were then acted upon by the city authorities, they were all deemed invalid.² And thus, where the clerk wrote up his journal from printed proceedings after a long lapse of time, and the minutes for each session were not

¹¹ *Fletcher v. Fugate*, 8 J. J. Mar. 681.

¹ *City of Covington v. Ludlow*, 1 Met. 295.

² *City of Louisville v. McKegney*, 7 Bush. 651. Judge Peters, evidently by mistake, speaks of the ordinance

itself not being spread on the journal. It ought not to have appeared there, except by its title. *Quære*: Is not the body of the ordinance, signed by the proper officers, higher evidence than the minutes showing its passage? See statute quoted below.

signed by the presiding officer, all the municipal acts contained in them were held void.³

The orders of the Levy Court, or of the County Court when held by the Presiding Judge, though they refer to matters of administration or taxation, are always in the form of judicial orders, and are tested by the rules applying to court records.

The proof of municipal acts raises more difficult questions. It was held, in 1842, that a city court having cognizance of offenses against the local ordinances or by-laws could and should take judicial notice of their existence and contents;⁴ but somewhat inconsistently, in 1887, the Court of Appeals declared void an enactment which required the courts of Jefferson County to take judicial notice of the ordinances of Louisville (without requiring other courts to do so), although these courts were intrusted with the enforcement of these ordinances in civil cases, as much as the city court in penal cases.⁵

When proof of municipal acts is needed, we first look into the statutory means of bringing it forward, and find that the General Statutes, copying from the revision of 1852, provide:⁶

“All courts, tribunals, and officers shall take notice of the official signature of any officer of this State, of the United States, or of any State or Territory in the United States.”

“A copy from the mayor’s office of any city, or from the official books of any town or religious society of an ordinance or by-law for the rule of such city, town, or society, attested by the keeper thereof, shall be evidence for any purpose for which the original could be received.” The questions: Who are officers of this State, and who is the lawful “keeper” of city ordinances? were thoroughly expounded by the Court of Appeals in 1877, in a street improvement case from Louisville in which the infancy of some of the defendants called for strict proof of all steps taken toward fixing the lien.⁷

³ *City of Louisville v. Gordon*, MS. opinion, 1883; see *Louisville City Code*, p. 360. This happening at Louisville, a curative act was obtained in 1871, but this of course could not impose obligations on individuals, nor

divest their vested rights.

⁴ *March v. Commonw'th*, 8 B.M. 25.

⁵ *Johnson v. Ferrell*, 8 Ky. Law Rep. 217.

⁶ Chap. 37, Sec. 6.

⁷ *Barret v. Godshaw*, 12 Bush, 592.

The following rulings were announced in the opinion :

1. The clerk of each board of the General Council is, under the charter, an officer of the city government, and, being such, also a State officer, of whose official signature the court must take notice, and the letters "C. B. C." and "C. B. A." are sufficient to denote the bearers of the names to which they are appended as Clerks of the Boards of Councilmen and o Aldermen.

2. Under the charter all proceedings and papers of the Mayor and General Council are "public records," and as such enjoy full faith and credit, and "official copies thereof may be read . . . as (those) of other public records." From this and Section 6, Chapter 37, of the General Statutes, the conclusion is drawn that the clerk of each board, being the keeper of its journals and papers, may certify under his hand whatever is done by his board.

3. Neither of these clerks, however, can certify what has been done by the board of which he is not clerk; hence neither of them, but the mayor is the keeper of ordinances and joint resolutions, and he is the proper person to authenticate copies of such instruments.⁸

⁸ To remedy this, an act of April 22, 1886 (Sess. Acts, Vol. II, 201), made the C. B. A. the keeper of all ordi-

nances, and the C. B. C. the keeper of all joint resolutions.

CHAPTER VIII.

OFFICIAL ACTS AND RESPONSIBILITIES.

SEC. 48. De Facto Officers.

SEC. 49. Responsibility of Ministerial Officers.

SEC. 50. Liability of Judicial Officers.

SECTION 48. DE FACTO OFFICERS. The rules distinguishing between officers *de facto* and *de jure*, as established elsewhere, have been acknowledged by the courts of Kentucky. One who has been improperly appointed or elected, or who does not possess all the qualifications prescribed by the organic or other law, or who has not taken the official oath or any part of such oath, or has taken such oath only before an officer not empowered to administer it, or who has, while in office, lost one of his qualifications by change of residence or by the acceptance of a Federal office, will, nevertheless, while he is permitted to carry on and does carry on the duties of the office to which he has been rightfully or wrongfully elected or appointed, be an officer *de facto*, whose acts are valid as between third parties until he is expelled from the office by direct proceedings; but he will not himself be protected by his official character for any forcible action which he may take or authorize.¹

While Kentucky thus approves the general doctrine, it has grafted upon it some exceptions and extensions. Thus where,

¹ Rodman v. Harcourt & Carrico, 4 B. M. 224 (justice, appointed such while postmaster); Patterson v. Miller, 2 Met. 493 (sheriff, elected while residing in another county); Rice v. Commonwealth, 3 Bush, 14 (police judge, having taken the official oath before a notary); Morgan v. Vance, 4 Bush, 823 (collector of taxes, who

had not taken the test oath against dueling); L. & H. T. P. R. Co. v. McMurtry, 6 B. M. 218 (a justice who had moved out of the county); Justices of Jefferson v. Clark, 1 Mon. 86 (a ruling not necessary for the decision, as to a Justice improperly appointed).

by an additional oath, persons already filling an office are to be clothed with new powers (f. i., a board of aldermen to be turned into a court of impeachment), the failure to have such oath properly administered renders the proceedings carried on in the new character wholly void.²

When, under the charter of a city, councilmen are elected for a term of one or two years and no longer, but in the belief that they remain in office till their successors are qualified, hold another meeting and do business between the election of the following year and the first meeting of the new council, their acts on such occasion are void; they are not a *de facto* council.³ But from the opinion of the court and the authorities quoted it seems that the position of treating them as a *de facto* council was not raised.

And an oath administered by a *de facto* officer (for instance, a judge of election who has himself not been sworn) is, when false, not perjury under a definition of that offense, which requires the false oath to have been administered by an authorized person.⁴

While the law recognizes an officer, it does not tolerate an office, *de facto*, unless, indeed, the whole government be overthrown by revolution. Those who assume to act in an office which under the Constitution can not or under the laws does not exist, can not perform any binding acts. This doctrine was announced by the Court of Appeals, in 1829, as to the acts of "Messrs. Barry, Haggin, Trimble, and Davidge," that is, the New Court Judges, in dismissing an appeal to the Court of Appeals, for not filing the records with "F. P. Blair, who was acting as clerk to them."⁵

SEC. 49. RESPONSIBILITY OF MINISTERIAL OFFICERS.
The duties and responsibilities of sheriffs, court clerks, and

² Tomppert v. Lithgow, 1 Bush, 176. The aldermen were sworn by a notary to try the impeachment.

³ Higdon v. The City of Louisville, 2 Met. 526. See, on the other hand, Sec. 29, n. 2, for a judge holding his seat for more than the proper term, being deemed a judge *de jure*.

⁴ Biggerstaff v. Commonwealth, 11 Bush, 169, supported by English authority.

⁵ Hildreth's heirs v. McIntyre's devisee, 1 J. J. Mar. 206. See *supra*, Sec. 7, as to Old and New Court controversy.

commissioners carrying on judicial sales are, in Kentucky, very much the same as elsewhere in America or England, except as far as they have been modified by statute. Under the name of sheriff must be comprised not only the coroner and jailer, who in special cases may act in his stead, but constables, the Marshal of the Louisville Chancery Court (who is also the standing commissioner for all decretal sales in Jefferson County ordered by his court), and city marshals, when serving process.

1. *Taking Bonds.* The duty of justifying bondsmen is thrown upon sheriffs, clerks, and commissioners at almost every step, and they are as much answerable to one party for refusing a good bond, and thereby subjecting him to loss or annoyance, as to the other party for accepting a bond insufficient either in form or in the solvency of the sureties. The Code of Practice in Civil Cases, in Section 611, lays down the rule, by observing which officers can keep themselves harmless against loss, though the sureties should afterward fail: "The surety in every bond . . . must be a resident of this State, and be worth double the sum to be secured beyond the amount of his *debts*, and have property liable to execution in this State equal to the sum to be secured." (Two or more sureties must have the qualifications in the aggregate.) Section 76 of the Criminal Code fixes in like manner the qualifications for bail.

It will be seen that the word "debts" is not coupled with "liabilities;" this might allow a man with limited means to sign any number of bonds, for each of which by itself he can justify. The question has been much talked about, but never brought before an appellate court, except indirectly, in cases where the question arose whether a man's suretyship was to be considered in determining upon his solvency or insolvency.

2. *Indemnifying Bonds.* A sheriff holding an attachment, distress warrant, or general attachment, and who is called upon by the plaintiff to levy on or to sell property of which he "doubts" whether it be subject to levy under his writ, may shield himself against responsibility by insisting on an indem-

nifying bond.¹ If the plaintiff will not or can not give the bond, he can not hold the officer for a failure to levy or to sell; if he gives it, with sufficient surety, the owner of the property wrongfully levied upon can not sue the sheriff, but has his recourse against the obligors in the bond alone, though these should afterward become insolvent. The validity of a law which allows the sheriff thus to commit a trespass without answering for it has never been questioned.² If the bond does not contain the clauses securing the claimant of the property against damage, the officer is not discharged.³ Where the bond was given and returned after the true owner had brought suit against the sheriff, it was deemed too late; and he can not defend the trespass involved in the mere levy unless he takes the bond before levying.⁴ But as the return of the bond before suit brought against the sheriff had been mentioned in these cases as necessary, the claimant in a late case hastened his action so as to anticipate the sheriff, who had taken the bond long before the sale, but returned it one day thereafter to the clerk's office. The court thought that it was proper for the sheriff to keep the bond with him at the sale, as one of its clauses guarantees the title in all articles sold to the purchasers, and reversed a judgment rendered against the sheriff for the value of the goods.⁵

On the other hand, where the officer fails to levy, or to safely keep the property, he is not liable for more than the execution defendant's interest therein; if the property belongs to others, no substantial damages can be recovered.⁶

It has been held, that where the sheriff is notified that the goods on which he has levied are not the property of the defendant, but persists in selling them without asking for a bond of indemnity, and the purchaser pays for but loses the goods,

¹ Civ. C. Prac., Secs. 641-643, as to executions and distress warrants; Sec. 211, as to attachments.

² *Gunn v. Gudehus*, 15 B. M. 447. A remarkable case, as under a provision of the Code the execution plaintiff was substituted as a defendant for the sheriff, and judgment was

rendered for him, because the *sheriff*, having given an indemnity, should not have been sued.

³ *Jewell v. Mills*, 3 Bush, 62.

⁴ *Green v. Hackley*, 3 Metc. 386; *Carrington v. Herrin*, 4 Bush, 624.

⁵ *Rudy v. Johnson*, 11 Bush, 543.

⁶ *Snoddy v. Foster*, 1 Metc. 160.

the sheriff is liable as on a warranty of title, which he would not be if he had not been warned.⁷ An indemnity bond contains a warranty to the purchasers, and it was thought right that the sheriff should assume that responsibility of the bondsmen, of which by his precipitancy the purchaser was deprived.

3. The statute imposes on the sheriff (aside of a fine for not returning on the return day an execution, or an attachment to enforce a decree in chancery⁸), a penalty of thirty per cent, recoverable by action or motion from him and his sureties, along with the amount of the execution and the costs of recovery, if he fails *without reasonable excuse* to return an execution placed in his hands for thirty days after the return day,⁹ and a penalty of fifteen per cent *per annum* if he collects any money on execution or other process, and does not at once pay it over to the party entitled thereto, his agent or attorney;¹⁰ and it does not allow to him, in any proceeding against him for delay, the defense of the plaintiff's consent to or request for such delay, unless he can show the consent or request of the plaintiff, his agent or attorney, in writing.¹¹ The law giving the penalty of thirty per cent has been construed narrowly as being highly penal. Thus the want of "reasonable excuse" must be pleaded or set forth in a notice of motion.¹² The liability is classed among those created by statute, rather than by the sheriff's bond, and is as such barred by the shorter limitation of five years.¹³ The remedy is given to the plaintiff in the execution; not to one defendant, who as surety pays the debt after return day, and is thus substituted to the plaintiff's claim and to all "liens" in its support, the right to this penalty not being a lien.¹⁴

⁷ Harrison v. Shanks, 13 Bush, 620. A remark in McGhee v. Ellis, 4 Litt. 244, that the sheriff is liable to purchasers for want of title in goods sold, is rejected as a mere *dictum*, but is followed to the limited extent stated above.

⁸ Gen. Stat., Ch. 38, Art. XVII, Sec. 8, construed in Deposit Bank of Cynthiana v. Glenn, 1 Metc. 587.

⁹ Ch. 38, Art. XVII, Sec. 5, lim-

ited by Sec. 6, that when the money due has been paid, only the thirty per cent penalty can be recovered. See Commonwealth v. Bosley, 5 Bush, 221.

¹⁰ *Ibid.* Sec. 4.

¹¹ *Ibid.* Sec. 2.

¹² Johnson v. Bradley, 11 Bush, 666.

¹³ Royse v. Reynolds, 10 Bush, 286.

¹⁴ Sanders v. Bank of Ky., 1 Metc. 327.

The responsibility of the sheriff and county clerk for State and county revenue, or for fee bills, lies out of the scope of this work; the question, what wrongful acts of such officers, or reception of money by them is official, so as to render their sureties liable, will be treated under the head of Statutory Bonds.

It remains to mention two decisions, made on common law grounds, which extend a sheriff's civil liability beyond the ordinary rules.

It was held in one case that a sheriff, holding several executions in his hands, of different dates, all against one defendant, but some of them including other defendants with him, must at his own peril undertake to marshal the assets so as to satisfy as near as he can all the writs.¹⁵

It was also held (Judge Robertson, in the opinion of the court, admitting the absence of all precedent), that the Commonwealth may recover damages in a civil action against the sheriff for failing to execute a warrant of arrest for a finable misdemeanor; but as the appeal came up from a judgment for defendant on demurrer to the petition, the court did not define the measure of damages, and admitted that it would be difficult to do so.¹⁶

SEC. 50. LIABILITY OF JUDICIAL OFFICERS. As a rule it is both illogical and unfair to hold a judge to account, either civilly or criminally, for a false judgment, or even a failure to act, or an excess of jurisdiction where the measure of such jurisdiction is one of the points before him.¹

There are, however, exceptions:

1. *Judges* of all courts are, in Kentucky as in most other States, answerable in a stated sum—\$500—to a petitioner for habeas corpus, upon refusing without good cause to issue the writ.²

2. The *County Judge* is charged with the appointment of guardians, who have to execute a "covenant" (that is, an unlimited bond) for the faithful performance of duty. The statute proceeds:

¹⁵ Commonwealth *ex rel.* Tiffany v. Hurt, 4 Bush, 64.

¹⁶ Com'nw'th v. Reed, 2 Bush, 618.

¹ Kean v. Woolley, MS. O., Jeff. Court of Common Pleas, 1883.

² Cr. C. P., Sec. 401.

“If the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judge so in default and his sureties shall be jointly liable to the ward for any damage he may sustain thereby.”³

Where by an oversight a guardian appointed for several infants had executed a bond securing only a part of them (no other bond could be found in the bond-book) and the guardian defaulted, the County Judge was held responsible to the unsecured wards.⁴ But the statute gives this remedy to the ward only; a surety on a guardian's first bond, who obtains an order for new sureties and fails to be discharged by the negligence of the County Judge in taking a void bond, can not avail himself of it.⁵

Where it was alleged that the County Judge “negligently failed to take a covenant with good surety, and negligently failed to examine into the solvency of the sureties, etc.,” and that they were insolvent and the guardian defaulted, this was deemed the same as that he neither knew the sureties to be good, nor made inquiries, and sufficient to hold him.⁶ But the judge does not, like a clerk or sheriff, guarantee that the sureties which he accepts are good at the time, which indeed is impracticable, as the amount of the covenant is unlimited.⁷

3. *Justices of the Peace.* It was said in an old case,⁸ without being material to the decision, that a magistrate giving a wrong judgment from corrupt motives, in a case within his jurisdiction, would render himself liable to an action; but it is very doubtful whether at this day such a suit would be maintained. But where he steps out of his limited jurisdiction it is different, and then his good faith is immaterial. Two justices have the power to hold to bail or commit for a felony, and where a single justice examined a prisoner brought before him on a charge of felony, without calling in another justice,

³ Gen. Stat., Ch. 48, Art. I, Sec. 4, 599.
taken from similar section in R. Stat.

⁴ Daniel v. Vertrees, 6 Bush, 4.

⁵ Kinnison v. Carpenter, 9 Bush,

⁶ Colter v. McIntyre, 11 Bush, 565.

⁷ Burdine v. Pettus, 79 Ky. 240.

⁸ Gregory v. Brown, 4 Bibb, 28.

and sent the prisoner to jail for want of bail, he was held answerable for false imprisonment.⁹

4. *Judges of Election.* The English doctrine, that the officials conducting an election are at all events responsible in damages for refusing the vote of a qualified elector, has not been adopted in Kentucky. The two judges of election, and the so-called sheriff, who gives the casting vote, act judicially, and are responsible only for malice;¹⁰ such as refusing on political grounds the vote of one known to them as a legal voter.¹¹

⁹ *Revill v. Pettit*, 8 Metc. 319.

497; *Dudley v. Morgan*, *Ib.* 711.

¹⁰ *Caulfield v. Bullock*, 18 B. M.

¹¹ *Chrisman v. Bruce*, 1 Duv. 66.

BOOK SECOND.

THE LAW OF REAL ESTATE.

CHAPTER IX.

THE FIRST DISPOSITION OF THE LAND.

SEC. 51. Boundaries.

SEC. 52. Virginia Claims.

SEC. 53. The Older Kentucky Claims.

SEC. 54. The Entry.

SEC. 55. The Survey.

SEC. 56. The Patent.

SEC. 57. Modern Grants.

NOTE.—In the following chapters (especially IX and X) we shall state the law on some subjects as it was from time to time changed by statute; and we shall try to give the judicial construction of each statutory provision where it first occurs, though the decisions were rendered under some later re-enactment.

SECTION 51. BOUNDARIES. In 1776 the county of Fin- castle, of the newly arisen State of Virginia, comprised all of its wild western lands, and among them all the territory now known as Kentucky. By a Virginia act of that year the county was divided into the new counties of Montgomery, Washington, and Kentucky, the last named of which became afterward the District, and a few years later the State of the same name. The boundaries of Kentucky County are thus defined: "All that part thereof (that is, of Fincastle) which lies to the south and westward of a line beginning on the Ohio at the mouth of Great Sandy Creek (now known as Big Sandy), and running up the same and main or northeasterly branch

thereof to the Great Laurel Ridge, or Cumberland Mountain; thence southwesterly along the said mountain to the line of North Carolina."¹

The subsequent treaty of peace with Great Britain, and the cession in 1784 of the territory northwest of the Ohio River by the State of Virginia to the United States, fixed the Ohio as part of the northern, and the Mississippi as the western boundary of Virginia, and thus as the northern and western boundaries of the new county and future State. As Virginia had held at one time both sides of the Ohio River, and had ceded only the territory northwest of it, she remained (and Kentucky through and after her) the owner and sovereign of the river-bed as far as low-water mark on the northern side,² together with all the river islands. By an act which the Kentucky Legislature passed in 1810, the counties bordering upon the river are expressly declared to extend to the State line, thus taking in the bed of the river.³

In 1799 Commissioners appointed by the States of Virginia and Kentucky submitted a report as to the true boundary between the States. The line was run from the starting point in the North Carolina line, in the main due northeast (*i. e.*, N. 45 E.), to the northeasterly fork of the Great Sandy, and down that fork and river to its mouth in the Ohio. Until then a more westerly fork of the Great Sandy had generally been considered the dividing line, and many entries of land in the intermediate region had, after the separation of the two States, been made in the Virginia Land Office. The agreement was to leave this region with Kentucky, to which it had be-

¹ Litt. Laws of Ky., I, p. 626; Gen. Stat., Ch. 8 (Bul. and F. ed. p. 210).

² Handley's lessee v. Anthony, 5 Wheaton, 375. The land involved in this case lay on the Indiana side within a sharp bend of the river, with a shallow channel or bayou to the north of it, which, when full, helped to inclose the land with water on all sides, but which became dry in very low water. It was held not to be a river island, but a part of Indi-

ana. But the rule of the text in favor of Kentucky's ownership and sovereignty was conceded.

³ Mor. and Br., I, 268; McFall v. Commonwealth, 2 Metc. 394. A misdemeanor (solemnizing marriage without license), committed on a boat in the river in front of Newport, was punished under an indictment laying the offense in Campbell County. See also Louisville Bridge Company v. City of Louisville, 81 Ky. 189.

longed of right, but that all Virginia entries made there before October 1, 1799, should be as good as if the lands were in Virginia. A Kentucky act of December 12, 1799, ratified this agreement, with the proviso that it shall be in force "so soon as Virginia shall pass a similar law."⁴

This act, as construed by the Court of Appeals in 1851, in the only reported case arising under it, gives validity to Virginia entries within the disputed boundary made before October 1, 1799; but it does not allow that State to perfect the entry by a patent after the date named; and it is left undecided whether Virginia patents issued before that date would have been good.⁵ Hence the claimant under the Virginia government could, between June 1, 1792, and October 1, 1799, have acquired only an equitable title, to be perfected afterward by a Kentucky patent.⁶

The southern boundary of the State is that which, before the erection of Kentucky and Tennessee into States, separated Virginia and North Carolina, and was supposed to be the line of 36° 30'. It was run in the years 1779 and 1780, and is known as "Walker's Line." In 1819, after the extinguishment of the Indian title to the land west of the Tennessee River, a line between it and the Mississippi River was run by Alexander and Munsell along the parallel of 36° 30', and it was then found that Walker's line was about ten miles too far north. An agreement was then made between the States of Kentucky and Tennessee, recognizing Walker's line from the Cumberland Mountain to the Tennessee River as the true line of sovereignty and jurisdiction, but reserving to the State of Kentucky all the lands "now" (*i. e.*, February 2, 1820) vacant and unappropriated, lying within the strip included by Walker's line on the north and the parallel of 36° 30' on the south, and the power of passing all laws for disposing thereof; all entries of Virginia warrants made within the strip to remain good.⁷ A suit on behalf of the Commonwealth was

⁴ M and B. Stat., I, p. 266. The Virginia Legislature passed the necessary act of approval.

⁵ *Salmons v. Webb*, 12 B. M. 365.

⁶ See *infra* in Section on *Entries*.

⁷ Bul. and Fel. edition Gen. Statutes, p. 214.

lately brought to declare a patent granted within this strip void by reason of fraud and illegality, but the court dismissed it for want of jurisdiction, and the courts of Tennessee will have to pass on the conflicting Kentucky surveys and patents.⁸

In 1878 acts were passed by the legislatures of Kentucky and Indiana settling a dispute as to certain river islands between Henderson and Evansville.⁹

The main channel of the Mississippi River, as it ran in 1792, is the boundary of Kentucky toward the west. The islands within it and over which Kentucky has always claimed jurisdiction are those known as Nos. 1, 2, 3, 5, and 8.¹⁰ Island No. 5 is also known as Wolf Island. Kentucky's sovereignty over this island was affirmed by the Supreme Court at the December Term, 1870, in the suit of the State of Missouri against the State of Kentucky.¹¹ About the other islands there never was any contest.

SEC. 52. VIRGINIA CLAIMS. The title to lands in Kentucky is never derived from the United States, but either from Virginia or from the Commonwealth of Kentucky. Even where the Indian title was extinguished through treaties made by the United States Government, as in the case of the lands on Clinch River acquired from the Cherokees by the Treaty of Tellico,¹ and in "Jackson's Purchase" of the lands west of the Tennessee River,² the soil vested in the Commonwealth.

Most of the valuable lands in Kentucky are held under patents, or at least under "entries" antedating the separation of the State from Virginia, and a short account of the Virginia land system, applicable to "lands on the western waters," must be given.

When, by the Treaty of Paris, the British Crown obtained

⁸ Commonwealth v. Bowman, 10 Ky. See at end of Section 56, *infra*, as to the advantage resulting to those holding under the questionable patent, by the failure to cancel it at the suit of the Commonwealth.

⁹ Bul. and Fel. ed. Gen. Statutes, p. 221.

¹⁰ Act of February 15, 1837, ordering sales of lands on Mississippi islands. Loughb. Stat., p. 394.

¹¹ Missouri v. Kentucky, 11 Wall. 395.

¹ U. S. Statutes at Large. The treaty was concluded October 25, 1805.

² *Ibid.*

undisputed control of the Northwest, the king by proclamation forbade his governors from granting surveys or patents for lands "beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the West or Northwest." However, Lord Dunmore, the last royal governor of Virginia undertook, in 1773 and 1774, to grant several land patents³ on the western waters, and both land speculators and sturdy pioneers turned their eyes about that time to Kentucky. The next important step in the history of Kentucky land titles is this clause in the ordinance of the Revolutionary Convention of Virginia, adopted in 1776 :

"No purchase of lands shall be made of the Indian natives, but on behalf of the public by authority of the General Assembly."⁴

In 1778 the Virginia Legislature pledged itself to the officers and soldiers of that State, by resolution, that the lands between the Green River, the Ohio, the Tennessee River, and the North Carolina line should be reserved, as far as necessary, for the location of the land warrants promised to them for service in the Revolutionary War, excepting the grants already made (in the same year) of 200,000 acres (12½ miles by 25 miles) to "Richard Henderson & Company," at the mouth of the Green River, in lieu of much larger tracts bought by them from the Indians, which they had to relinquish.

In 1779 the same legislature enacted an elaborate and comprehensive law as to the disposition of the "waste and unap-

³ Among these are the royal patents dated in December, 1773, to John Connelly and Charles Warmstorff, each for 2,000 acres "in the county of Fincastle, on the south side of the Ohio opposite to the Falls thereof," now covered by a part of Louisville, the former of which was declared forfeited by the legislature of Virginia during the Revolutionary War, and resumed as enemy's property, and was moreover forfeited by inquest of office by the escheator for "Kentucky County" and a jury of

twelve men, including Daniel Boone. Half of it, that is, a tract of 1,000 acres, was granted to the "trustees of Louisville," from whom present titles are deduced, by act of May, 1780 (see Litt. Laws of Ky., Vol. III, p. 540); the other half was restored to John Campbell as purchaser from Connelly, and the present titles in this and the Warmstorff grant are deduced from the royal patent through Campbell.

⁴ Litt. Laws of Ky., I, 388.

propriated lands" within the borders of the State, meant mainly for those on the western waters.⁵

A few classes of inchoate titles still resting on *entry* or *survey* (which will be explained hereafter) are recognized in the first four sections of this act; among them the grant to certain land companies; the validity of claims by land warrants as far as issued under royal authority are also recognized. But the main features of the act look to future acquisitions of land, mainly on the grounds of (1) military services in the Revolutionary War, either in the Virginia line or of Virginians in the Continental line, (2) actual settlement on the lands, (3) payments into the treasury.

The act of 1779, with all its amendments, contemplates four steps as leading to a full or legal title: *first*, the obtaining of a land warrant, naming the number of acres, either for money or for military services, the place of which may be taken by actual settlement to the extent of 400 acres (aside of a slight addition for village sites); *second*, the entry of a short description of the desired land in the office of the county surveyor of the proper county; *third*, an actual survey, which by the act of 1779 was to be made within twelve months, marked on the ground, and the plat and notes to be returned to the land office; *fourth*, the issue of a patent following the description of the survey, under the Great Seal of the State and sign manual of the Governor.

⁵*Ibid.* 392-420. See legislative grant to Richard Henderson & Co. in Henning's Stat. at Large, p. 571, reprinted in M. and B. Stat., II, p. 938; names of associates and short history of their claim grounded on the purchase of all the lands between the Ohio, Cumberland, and Kentucky rivers in 1775 from the Indians, is found in *Halloway v. Buck*, 4 Litt. 293, and *Buck v. Halloway's devisees*, 2 J. J. Mar. 163. Surveys made in 1774 by the Kentucky assistant of the surveyor of Fincastle County, and on which patents were issued

under the act of 1779, are met with quite frequently in the Kentucky reports, f. i., in *Mercer v. Bate*, 4 J. J. Mar. 335. The act of 1779 and other Virginia acts affecting lands were re-enacted by the Kentucky Legislature in 1796 as a whole (subject to late amendments) with a view of having them published among the acts of that year, where Mr. Littell prints them in the first volume of his *Laws of Kentucky*, adding in smaller print some other acts of almost equal importance. In all they run from I, p. 385, to I, p. 464.

The warrant might have been due for services rendered before the passage of the act, either for "importation rights" (that is, for having brought immigrants, other than convicts into the colony) or for services to the crown in the French and Indian wars; or they might be acquired theretofore and thereafter by service to Virginia in the Revolution; or by payment into the treasury at the rate of forty pounds (Virginia currency) for each one hundred acres. The quantity allowed to soldiers and sailors ranged from 5,000 acres for a colonel to 100 acres for a private. Their warrants are known as "military," the other as "treasury warrants." The rights arising from settlement are known as "settlements" or "pre-emptions;" and those who have built a house or hut before 1778 were entitled to as much as 1,000 acres. To these, in 1781, were added the rights acquired by "poor persons" upon a *certificate* from the County Court to enter lands on credit. It is useless here to treat of the various settlement, pre-emption, village rights, and certificates in detail, especially as those large tracts on which disputes may arise even in our own days were located either on military or on treasury warrants.⁶

The act of 1779 excludes from entry or location: (1) The country of the Cherokee Indians, (2) the lands northeast of the Ohio, (3) those reserved by law for any Indian tribe, (4) the lands granted to Richard Henderson & Co., (5) the lands between the Green River, Ohio, and Tennessee; the last being set aside for military warrants only.⁷ Subsequently the country west of the Tennessee was also given up to "officers and soldiers," where they were to have first choice, to make up for the short-coming in the southern boundary of the State.⁸

⁶ The rank of the inchoate or equitable titles under the Virginia act of 1779 and its amendments is set forth in the introduction to Vol. I of Bibb's Reports, pp. 21, 22, under ten heads, beginning with surveys made before 1778 and ending with orders of survey by county courts for "poor persons" under the act of 1781; only after these come entries under the law of Kentucky.

⁷ Litt. Laws of Ky., Vol. I, p. 411.

⁸ The act is quoted in *Rollins v. Clark*, 8 Dana, 15, 17. It is there held that the country west of the Tennessee River is not within any of the original exceptions; and an entry on a treasury warrant having been made within it in 1780, it might be perfected afterward by survey and patent.

A Virginia act of the November session of 1781⁹ directed the Register of the Land Office to appoint a deputy "whose business it shall be to receive the plats and certificates of all surveys within the counties of Lincoln, Jefferson, and Fayette," which then comprised the District, or former county of Kentucky. Later Virginia acts lowered the price of treasury warrants, and extended the time of payment to pre-emptioners; but what is more important, they extended repeatedly the time for making and returning surveys,¹⁰ which the act of 1779 had (with a saving in favor of infants and persons in captivity only) limited to one year, under the penalty of forfeiting the entry, though with leave to lay the warrant again on the same or on other lands. In a late Virginia act, persons not residing in the county were required to appoint and name to the county surveyor a resident agent, on whom the surveyor might serve a notice; but the forfeiture denounced for failing to do so was by successive Virginia and Kentucky acts, the latter ranging from 1792 to 1797, put off from time to time, as it was deemed impossible in the then state of the country to make the surveys any sooner. The last act gave time to return surveys to November 29, 1798, and thereafter to all persons under disability—that is, infants, married women, those of unsound mind, or in captivity—for three years after removal of disability.

No new act giving further time was passed thereafter as broad as the preceding acts; but there were a number of extensions yet, the last of them by an act of 1811, which gave time for returning surveys until March 1, 1812, and expressly forbade patents from being issued on any surveys made since November 29, 1798, and not saved by the disabilities mentioned in that act.¹¹

As the county surveyors never gave the notice that they would survey the entries in their offices, the entry owners

⁹ Litt. L. Ky., I, 431. Virginia acts before 1787 bear no date but that of the session, taking effect from its first day.

¹⁰ See M. and Br. Stat., II, 907, 915,

beginning with Virginia act of 1785.

¹¹ M. and B. Statutes, II, 915-917. For effect of act of 1811, see *Redd's heirs v. Martin*, 9 Dana, 420.

residing within the county were never put in default by failing to attend; the forfeitures of entries between 1798 and 1812 fell entirely on the entry owners not living in the county containing the lands, who were in default by not naming an attorney.¹²

In an early case the Court of Appeals delivered a long opinion, to the effect that wherever two Virginia entries came in conflict, and the Kentucky statute had extended the right of the senior entry holder to make his entry good by a survey beyond the time named in the Virginia law, that this was a wrong done to the holder of the younger Virginia entry, and therefore a violation of the compact; but on petition for rehearing the opinion was withdrawn, it appearing that the question was not before the court.¹³ Six years later JJ. Bibb and Mills, sitting alone, sustained an entry saved by the extending statutes of Kentucky; the latter avoided the question; the former held that the forfeiture for failing to survey was reserved to the Commonwealth alone, which had the right at any time to waive it by statute; that the Compact with Virginia¹⁴ did not, by guaranteeing the permanence of her land laws, secure to the holder of the younger entry the right to the destruction of the older interest; that he could not insist on the supposed effect of the laws of Virginia that would annul one of its older entries so as to give force to a younger title. Thus the law has stood ever since.¹⁵

Many of the Virginia entries were completed by patents under the Great Seal of the State and the sign manual of her Governor; many others remained without survey and consequently without patent, when on the first of June, 1792, Kentucky became a separate commonwealth. A few days thereafter the legislature of the new State, by law, created a Land

¹² *Simpson v. The Register*, Pr. Dec. 217 (1803). Case of a resident; no surveyor had as yet given notice (*Shackleford v. Kennedy*, 1 A. K. Mar. 435; *Clay v. Ballenger*, *Ibid.* 462); non-residents of the county lost their entries.

¹³ *Hoy's heirs v. McMurry*, 1 Litt.

863 (1822).

¹⁴ See clause in question below.

¹⁵ *Beard v. Smith*, 6 Mon. 430-523 (1828). The position here taken by Judge Bibb alone was sustained by the whole court five years later in *Boone & Talbot v. Helm*, 5 Dana, 412.

Office, the Register to be appointed by the Governor, to hold office during good behavior; to provide books; all records of land titles, when obtained from Virginia, to be deposited in his office; thereafter all certificates of surveys to be returned to him, and all grants (which means all patents) to issue from his office.¹⁶

We have referred to the effort to secure, as far as needed, the lands west and south of the Green River to officers and soldiers, and will hereafter refer to the conflict between the holders of military warrants and Kentucky settlers.

As the Compact with Virginia protected only those entries which were made on or before May 1, 1792,¹⁷ the extent of the conflicting claims could not grow indefinitely.

The important clause of the "Compact" reads thus:

"*Third.* That all private rights and interests of lands within the said District, derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed State."

The occupying claimant laws of Kentucky, enacted in 1797 and 1812, were deemed void by the Supreme Court of the United States as violative of this compact,¹⁸ but were sustained throughout by the State courts.¹⁹ Laws shortening the bar of limitation, like the seven years' limitation law of 1809, wholly prospective, in suits for land claimed under a junior patent and held for seven years as a residence,²⁰ or the act of 1814, striking from the limitation law the disability of being "out of the Commonwealth," and reducing the time after discovery from ten to three years,²¹ were also sustained as being reasonable regulations of the remedy. The act of 1792, making a patent issued to a person, dead at its date, inure to his heirs, was construed as retrospective and giving force to

¹⁶ Litt. Laws Ky., Vol. I, p. 75; see amendatory acts on pp. 159-165, 174, 216, 368.

¹⁷ "Compact," Sec. 10, Litt. Laws Ky., Vol. I, p. 19; Bul. & Fel. edition General Statutes, p. 53.

¹⁸ See *supra*, Sec. 6, referring to *Green v. Biddle*.

¹⁹ *Fowler v. Halbert*, 4 Bibb, 52, and many other cases.

²⁰ M. and B. Statutes, Vol. II, p. 1141; *Clay v. Fox*, 1 Mar. 557.

²¹ M. and B., p. 1144; *Nelson v. Wilson*, 4 Bibb, 561 (on narrow grounds); *Kendall v. Slaughter*, 1 Mar. 377 (on general grounds).

patents already issued, and held not violative of the compact, as it tended to strengthen, not to weaken, "private rights and interests of lands" derived from Virginia.²²

An act of 1820 as to lands below the Tennessee River, prospective only, directed that the entry should be returned to the Register with the survey, to enable him to see that they corresponded, and forbade him to issue a grant for any land not contained in the entry. This act was maintained on the ground that the "private rights and interests of lands" were bounded by the entries made on or before May 1, 1792, and could not be extended beyond it.²³

The fourth section of the act of February 10, 1816, "regulating certain surveys," forbade the rendering of judgment in ejectment where the plaintiff's patent was issued on an entry made after October 19, 1785, and a survey returned after September 30, 1798, unless the jury find specially that the patented land corresponds with the entry; and an act of 1817 extended the rule to all patents issued since 1810, on Virginia treasury warrants, settlements, or pre-emptions. The former act also provided, in its first, second, and third sections, that no patent should be issued on surveys made upon treasury warrant entries later than October 19, 1785, unless the holder of the survey will make affidavit, and the surveyor will certify to the identity of the land.²⁴ The first three sections were sustained against the objection of their violating the compact;²⁵ the fourth, in its application to patents issued before the act, seems to have been held bad by common consent. It is repealed by the Codes of Practice.

An act was passed in 1824 with a view to defeat outstanding titles, by requiring all owners of large tracts to improve so many acres per hundred within short-named time and confiscating their land by way of penalty for the benefit of the

²² *Hansford v. Minor's heirs*, 4 Bibb, 385. The report does not show whether the title thrown out by helping this Virginia claim was also a right or interest derived under the laws of Virginia.

²³ *M. and B. Stat.*, II, 1048; *Ray v. Barker's heirs*, 1 B. M. 364.

²⁴ *M. and B.*, II, 922, 923; *Litt. L. Ky.*, I, 585.

²⁵ *The Register v. Haggin*, 1 A. K. Mar. 466.

occupant. This reckless and clumsy statute was declared void as a plain breach of the Compact with Virginia.*

NOTE.—Among the Virginia claims may be reckoned the legislative grant of 4,000 acres, on which the "Town of Iron Banks," now City of Columbus, was laid out, given in 1783 to William Croghan and three other trustees, for the benefit of a fund for Virginia officers. The title was perfected by a Kentucky act of 1820 (M. and B. Stat., II, 1044).

SEC. 53. THE OLDER KENTUCKY CLAIMS. In Morehead and Brown's Statutes, under the general head of "Lands" and after "Virginia Claims," a number of Kentucky acts and parts of acts are collected under the following sub-heads:

Head Right Claims, Seminary Claims, Tellico Claims, Treasury Warrant Claims, Claims Below Tennessee River. The inchoate titles to all of these were acquired under Kentucky law, including therein those provisions of the act of Virginia of 1779, which allowed four hundred acres of ground to actual settlers, and which remained in force after the separation.

Head-right claims, being those to which each "head" had a right, grew out of these "settlements;" but subsequent Kentucky statutes turned them into mere pre-emptions by putting a State price on the land. The payments of this price were hardly ever made in the time set; and a number of new statutes had to be passed, lowering the price, extending the times for payment, and relieving from forfeiture for default. Many families having settled to the south and west of the Green River, on land which was afterward entered on "military warrants," some of the earliest head-right acts were passed to protect or indemnify the settlers and to reconcile the conflicting rights. By an act of 1798 the "surveyors of the Virginia State and continental line" were forbidden to survey any entry south of Green River which had not been entered before May 1, 1792.¹

* Buford v. Gaines, 1 Dana, 479-517; quoted *supra*, Sec. 10, n. 1. The laws forfeiting lands for failure to list them have always been disregarded as unconstitutional, but have

been re-enacted in all revisions. See *supra*, Sec. 10.

¹ M. and B., p. 935, (Head-right Claims, pp. 924-1000). Where a settlement was given to a young man

The seminary claims arose from an act of February, 1798, reserving for the use of the "seminaries of learning" throughout the Commonwealth all the lands on the south side of the Cumberland River, "below Obey's River," which were then vacant and unappropriated, etc., and another act of December of the same year, which authorizes the counties in which seminaries had not yet been established, to have located, surveyed, and patented their quota of lands in that district; also allowing the several academies, to whom six thousand acres each had been granted by the former act, to survey and register their lands.² Other acts provide for the sale of these seminary lands, with a view of establishing a "literary fund."

The "Tellico claims" are in the small district along the southern line of the State, the soil of which was acquired by the Treaty of Tellico, and these were at first³ "settlements," like the head-rights; but, by a later act, land within this district might be taken up on treasury warrants.

The "treasury warrant claims," properly so called,⁴ begin under an act of 1815, which throws the "waste and unappropriated" lands of the Commonwealth open to sale "at the rate of \$20 for every hundred acres, and so in proportion for a greater or smaller quantity;" the Treasurer's receipt entitled the holder to a land warrant from the Register, naming the number of acres; and upon such a warrant being shown to any county surveyor, he is to make an actual survey, upon which a patent will be issued. Here we miss that clumsy contrivance of the "entry" preceding the survey, the distinguishing feature of the Virginia land law, that fruitful source

under eighteen, in violation of the act of December 20, 1807 (M. and B., p. 941), and his age was found by special verdict as less than eighteen, the certificate was not held void in a contest with an adverse claimant, the court holding that the statute was directory only; however, the decision was put on the ground, that a patent which can not be assailed collaterally had been granted. (Jennings v. Whitta-

ker, 4 Mon. 51.)

² *Ibid* p. 100.

³ See act of 1810; *Ibid*. p. 1009.

⁴ Act of Feb. 6. 1815; *Ibid*. p. 1019.

The only priority arises in the surveyor's office, from priority in time in applying for the survey, under Sec. 2 of the act. There are regulations intended to prevent the same land from being twice surveyed and patented.

of strife and woe to Kentucky and to her early settlers. Yet, in practice, the entry survived; the written request to the surveyor still gave a rough description of the land desired.

Actual settlers were given a preference to the extent of four hundred acres only in the purchase of land under the treasury warrants, and to avoid litigation, as the act of 1815 recited, the surveys made under such warrants were not to override older entries, even should they be bad for uncertainty.⁵ As the better lands were gradually taken up, the rate per acre had to be reduced. In 1820 it was put at ten cents per acre.⁶ Under the power reserved in the agreement with Tennessee, an act was passed in 1824⁷ for locating land warrants in the strip south of Walker's line, owned but not governed by Kentucky. Land that had once been granted by the Commonwealth, but had reverted to it by escheat or forfeiture, was not liable to appropriation under these laws, and they always exclude the lands west of the Tennessee River from their operation.

The "claims below Tennessee River" differ from all others in this, that before allowing any entries or settlements to be made in that region, after the extinguishment of the Indian title in 1818, the legislature first ordered the land to be surveyed and divided into ranges, townships, sections, and quarter sections, after the model given by the United States Land Office.⁸

An actual settler west of the Tennessee was allowed to enter two quarter sections, on one of which he must reside, and the other quarter must adjoin this; but as the sections and quarters were already surveyed, the entry by number dispensed with any further survey, such as followed an entry under the Virginia law. A "superintendent," provided for in the act, did the surveying; the State price was paid at first

⁵ *Ibid.* p. 1022, Sec. 10. As to requisites of "entries" see next section.

⁶ *Ibid.* p. 1028.

⁷ *Ibid.*

⁸ Act of Feb. 14, 1820. (Morehead and Brown's Statutes, p. 1040.) The measurements were often inexact, f. i.,

696 acres in one section. See Johnson v. Gresham, 5 Dana, 542. Andrew Jackson and Isaac Shelby having negotiated the treaty, the corner of the State west of the Tennessee is still called Jackson's Purchase, or, for short, "The Purchase."

to the Register, later on to a "Receiver" for the District, located at Waidborough, in whose office the entries were made. In 1839 the "Receiver" was abolished, and his records and duties turned over again to the land office. (By acts of 1876 and 1878, put as Chapter 65 in Bullitt and Feland's edition of the General Statutes, the separate receivership or land office has been re-established.)

There were but few Virginia "military" entries in this district, as the Indian occupation prevented them at first, and the Kentucky Legislature strictly forbade the survey of any Virginia entries made after May 1, 1792.⁹ Yet a contest came up as late as 1854.¹⁰ Acts of 1821 and 1825 ordered auction sales by quarter sections, but at the price demanded, \$1.00, much of the land was left unsold; most of this was gradually pre-empted by settlers. The settlement alone, without the recorded entry, was held to confer on the settler an equity in the land analogous to that of a Virginia "entry," which the Chancellor would enforce against the holder of an unlawfully obtained entry or patent by a decree for a conveyance of the defendant's title.¹¹

The price was lowered from time to time; in 1830 it was offered to actual settlers at 25 cents an acre; in 1825 the land was offered to all at 12½ cents.¹² The islands in the Mississippi, being deemed more valuable, were ordered for sale on special terms by an act of 1837.¹³

A great part of the legislation on head-right and other Kentucky claims before 1835 is made up with alternating directions for enforcing the State price by forfeiture or resale, and for extending indulgence to the settlers or first purchasers. These acts have almost lost interest for us, except as historic monuments of how poor both the Commonwealth and its citizens were as to ready money. At first, also, the

⁹ M. and Br. Stat., p. 1038.

¹⁰ Ashbrook v. Quarles's heirs, 15 B. M. 28.

¹¹ Johnson v. Gresham, 5 Dana, 542; Burgess v. Tipton, *Ibid.* 540; Harrison v. Woodruff, 6 Dana, 188; Bohannon v. Pace, *Ibid.* 194; Der-

ington v. Goodman, 8 Dana. The principle of these cases might still find application in a suit upon some old unpatented survey.

¹² M. and B. Stat., p. 1063; Lough. Statutes, p. 391.

¹³ *Ibid.* 394.

Commonwealth reserved the salt licks and mineral lands, as the United States do in their land laws, but this policy was gradually given up.

As late as 1852 laws were passed from time to time, extending the time for returning surveys made on Kentucky treasury warrants; and as such were no longer issued after February, 1835, there must have been ample time to perfect all titles of such origin.¹⁴

SEC. 54. THE ENTRY. Most of the valuable lands of the State were located upon "military warrants" or "treasury warrants" issued by the Virginia Land Office under the act of 1779 or its amendments: the location being made with the Deputy Register for the Kentucky District, if before the separation, or thereafter with the Register of the Kentucky Land Office.

The following entry, which in a leading case was held good, is given as a sample, together with the subjoined memoranda, as they appear in the book of the Lincoln County Surveyor:

"June 2nd, 1780. Arthur Campbell enters 600 acres upon Ty. Wt. on Flat Creek, about two miles northwest of the main gap of Cumberland Mountain, on the road passing to Kentucky, from Powell's valley, to begin at the said road, and to extend up in the forks of said creek, including the right hand fork, for quantity." "Surveyed 8th February, 1796." "Patented to Arthur Campbell, 8th November, 1796."¹

¹⁴ Loughb. Statutes, pp. 382-386; Rev. Statutes, Chapter 102, Section e. 12. They are here called "land office" warrants, in distinction to county warrants.

¹ Beard v. Smith, 6 Mon. 430. Considering that there is no reference to either latitude or longitude, and that the points in the entry are in no way connected by courses or distances with any point of common interest to all locators, we need not wonder at the fearful crop of litigation which arose out of this system or lack of system. Beside and after the ques-

tion of the validity of the entry, it must often be construed, in order to determine whether and how far it protects the possession of those claiming under it. Thus it has been held that a pioneer, making his entry, will always measure a distance along a river, or on some *impassable* creek by its meanders, but a distance between points on a shallow, easily fordable creek in a straight line. (Thruston v. Masterson, 9 Dana, 228.) The construction of an entry is not necessarily the same as that of a survey. Among the decisions on cer-

Such an entry, as well as a "settlement," under Section 5 of the Virginia act of 1779, as afterward modified by the Kentucky head-right laws, gave to the party making it an *equity* in the land which might be asserted against a patent to a stranger, either by caveat forbidding the issue thereof, or by bill in equity after its issue. A great deal of the land litigation of the early Kentucky days took this form: (1) An ejectment, by the holder of the senior patent against the owner of the junior patent, of the land embraced by both; (2) judgment being rendered, the holder of the junior patent would bring his bill in equity based on the older entry or settlement to enjoin the judgment at law; the court sitting in equity would then have to pass on the validity of the entry.

This course of litigation has for nearly if not quite fifty years gone out of date, but nobody can understand the language of the Kentucky Reports in land cases without having formed a clear conception of the "entry" with its requisites and effects, and especially of the entry under the Virginia laws.

George M. Bibb, then Reporter, afterward Chief Justice of the Court of Appeals, fully explains the theory and the workings of the "entry" in the introduction to his reports, from which we abridge what here follows, with the remark that what he says applies only to the entries under the Virginia law:

"The rules of landed property in Kentucky are in an eminent degree the creatures of the courts. . . . The disputes between claimants under the laws of Virginia have grown principally out of two requisitions in the statute of 1779; the one requiring of those claiming rights of settlement or of pre-emption to obtain certificates, etc., mentioning . . . the number of acres and *describing as near as may be the particular*

tainty in an entry, there is a class, ending with Horine's heirs v. Craig, 8 A. K. Mar. 587, of some importance as furnishing precedents for the late line of decisions on "blanket patents," which will be found below, in Section 56. The entry in Horine's

heirs v. Craig called for the corner of a named "settlement entry," and this in turn is to join and include "the settlement as near the center of the tract of land as *prior settlements will permit.*" The entry was held bad.

location, the other requiring the holders of land warrants to lodge them with the surveyor, and in a book . . . to 'direct the location thereof so specially and precisely as that *others* may be enabled with certainty to locate warrants on the adjacent residuum.'

"The text was short and novel: the commentary was left to the discretion of the judges. . . . The statute requires, first, a description of the particular tract, specially and precisely; that is to say, that the description shall apply certainly to *one identical* tract, and not *uncertainly* to *two* or *divers*; next, that this description shall enable *others* to find and know the identical tract intended. The statute intends the entry in the surveyor's book to be *notice to all persons* of the appropriation. The question is analyzed into *identity* and *notoriety* of the objects referred to in the location; the entry must contain *proper allusions to known* certain objects, which shall serve as *indices* to the particular tract of land intended. But, in deciding upon what description is sufficient to give identity to the location, various rules have been established, whereby entries have been helped and rendered identical by construction. A location "to include his cabin" in matter of fact admits of divers surveys, etc.; but as *matter of law* the courts have established as a rule in such cases, that the survey shall be in *a square* with lines due north and south, east and west, the cabin to be at the intersection of the diagonals. Thus (the quantity being expressed), when the particular cabin is ascertained, the location is reduced to mathematical certainty.

"The identity of the tract being ascertained, the enquiry is whether the *description* was at the *date of the location* with the surveyor sufficient to enable *others* to find and know it.

"This branch of the subject has called forth many decisions, and embraces the doctrine of *notoriety* so frequently recurring in questions upon conflicting claims."²

² I Vol. Bibb, pp. 16-21. The italics used in the extract are Mr. Bibb's own. The "settlements" under the head-right laws were only required to identify the land, but not bound to

do so by reference to notorious objects; the next locator had to notice the prior settlement at his own risk. (McIlhenny's heirs v. Biggerstaff, 8 Litt. 158.)

Thus in many land suits the result depended upon the question whether or not, thirty, forty, or fifty years before the hearing of the cause, a certain spring, creek, road, cabin, or cornfield was well known in the neighborhood by the name or designation it bears in the entry, and whether no other spring, creek, or road of the same name was near enough to be mistaken for it.

But, as the learning on this subject is obsolete, it is useless to go into its details. Thus the cases on entries are given in Barbour's Digest under ten headings, without statement of facts.

The latest of these digested cases, decided in 1848, turns, however, on very different points than "certainty" and "notoriety," and may even now have important bearings. An entry had been made in 1783; in 1786 the land was surveyed. Nothing is said in the opinion about the survey being "returned." The opinion speaks, however, of the entry and survey as a "dead letter," without explaining that the failure to return the survey in time killed both entry and survey. The reporter, in a side note or syllabus, undertakes to supply this reason by saying "and a survey in 1786, but not registered." A suit in equity being brought on the entry and survey against a junior patentee, it was dismissed on the ground that, in 1834, when the adverse claim arose, the holders of the entry thus surveyed had no title in either law or equity,³ except so far as they had "improved and cultivated" a part of the land, which gave them a pre-emption under the "act of 1831."⁴

SEC. 55. THE SURVEY. By acts of the Colonial Legislature of Virginia, passed in 1748 and in 1763, county surveyors were regulated as public officers. By an act of 1772,¹ which remained in force in Kentucky till abrogated in 1852 by the Revised Statutes, all surveyors are thereafter to "return all their new surveys and protract and lay down their plats by the true and

³ Rountree v. Barton, 8 B. M. 627.

⁴ Mor. and Br. Stat., II, 1027.

¹ Litt. Laws Ky., Vol. I, p. 389; M. and B., II, p. 1494. Thus a survey of 29,823 acres made in 1784 by

Thomas Marshall, surveyor of Fayette County, for John Carnan, is headed thus: "Variation of Needle, 3° 50' east."

not by the artificial or magnetic meridian," and moreover to denote the variation. In resurveys they were to note both the old variation and that prevailing at the time of the resurvey.

As the surveyors had neither the appliances nor the skill² to work by any other than the magnetic meridian, they could obey this law only as far as men of science made known from time to time the degree of variation of the needle, by which the surveyors might then correct their magnetic courses; and, as the variation in Kentucky differed materially from the variation at eastern points, equipped with astronomic instruments, the Kentucky surveyors, unless by accident, were never correct in their bearings.

The modern Kentucky statute³ says nothing of the true meridian, but directs that, in surveying land previously surveyed the surveyor must do it by the magnetic meridian, but must note the variation at the time of both surveys "if it can be done," and adds, "every survey shall be made by horizontal measurement." This always was the rule of both law⁴ and science; but many old surveys, being measured along a rolling surface, ran short when resurveyed by the true rule.

Yet under the rule of the old statute the court construed, in 1811, a contract for land to be laid off by the "cardinal points" as referring to the magnetic meridian, this being the usage of the country.⁵ And in 1813 the court altogether nullified the statute by construing the calls of an entry as depending on the magnetic meridian such as it was at the date of the entry, and by intimating that the surveyor ought to ascertain what the variation of the needle then was, in order to run his lines accordingly, thus introducing a great element of confusion, as the variations of former years were not easily ascertained. The course of variation is a fact to be proved,

² As late as 1825, when the legislature of Kentucky needed a man capable of working by star observations, the provision to have a "surveyor" was repealed and a "mathematician" was substituted. (See M. and B., II, p. 1035.)

³ Rev. Stat., Ch. 98. Art. II, Sec. 8; Gen. Stat., Bul. and Fel. ed., p. 1226 (105, II, Sec. 3).

⁴ Bryan v. Beckley, Litt. Sel. Cas. 93.

⁵ Finnie v. Clay, 2 Bibb, 351.

and not within judicial knowledge.⁶ A survey made in 1774 came thrice before the Court of Appeals in a suit between Bryan and Beckley, only two corners forming one side and enough of another side to show its direction, out of four sides, being found on the ground; the decisions were rendered in 1801, 1809, and 1814.⁷ On the second appeal the court quotes these principles as established by the first opinion, among others:

1. Nothing but necessity will justify a departure either from course or distance.

2. When a departure from either course or distance becomes necessary, then the *distances* ought to *yield* (unless where the language of a description shows a clear intention to the contrary, is a later modification of this rule).⁸

3. That in all cases where lost lines and corners are to be reserved, due allowances must be made for the variations of the magnetic needle from the true meridian.

4. Proper allowances are to be made on each line for the unevenness of the ground over which it passes.

Some other rules are given in Bryan and Beckley, and the old cases as to replacing lost boundary lines and reconciling conflicts when the plat or report of the old survey is not consistent, or, in the old phrase, "does not close."

5. The variation from the true meridian in an old survey is to be gathered from the lines preserved, and, when thus found, applied to the lost lines.⁹

6. The position of the first corner is no more sacred than that of any other; hence the lines may be run back from any other corner, reversing the courses.¹⁰

⁶ Vance v. Marshall, 3 Bibb, 150. Mr. Bibb, the Reporter, in a subsequent *quære* sharply criticises the opinion.

⁷ Beckley v. Bryan, Pr. Dec. 93; Bryan v. Beckley, Litt. Sel. Cas 93; Same v. same, *Ibid.* 100. The survey taken shortly before the last decision was to be corrected by $3\frac{1}{2}^{\circ}$, the change of variation since the first survey taken in 1774.

⁸ Blight v. Atwell, 4 J. J. Mar. 278, where it clearly appeared that two corners should each be at the same distance from the Ohio River.

⁹ Haggan v. Wood's heirs, Pr. Dec. 274 (case of a private survey within a pre-emption).

¹⁰ Beckley v. Bryan, Pr. Dec. 107; Pearson v. Baker, 4 Dana, 828; Thornberry v. Churchill, 4 Mon. 82.

7. That construction, in case of doubt, prevails which is most against the party claiming under the survey.¹¹

8. That the lines as run inclose a surplus above the named area is of no import, except as circumstantial evidence.¹²

The rule that distances must yield to courses is often expressed thus: When a corner is lost it will be put at the intersection of the lines leading to it.

We need hardly refer to the rule in force everywhere, that courses and distances both yield to natural or artificial objects; and even a marked line will yield to the call for a river as a boundary.¹³ Otherwise marked lines always control.¹⁴

A rule given for construing entries, that the distance from one to another point on a road or water-course must be measured either according to its meanders, or in a straight line, as a man would travel in one or the other way,¹⁵ might probably not be applied to a survey.

Sometimes, where corners called for in an old survey corresponded only partially or slightly with the objects in sight, parol evidence would be let in to determine the doubt.¹⁶

Where the survey is not in conflict with the land itself, but with the entry, which it ought to follow, all presumptions are made in its favor.¹⁷ The following strong language was used in one pretty late case, and approvingly repeated in another:

"The military entries have been surveyed mostly by disinterested surveyors chosen under State authority, and sent out with instructions to make their surveys correspond with

¹¹ Preston's h's v. Bowman, 2 Bibb, 493; Pearson v. Baker, 4 Dana, 324.

¹² Mercer v. Bate, 4 J. J. Mar. 338.

¹³ Bruce v. Morgan, 1 B. M. 26; Bruce v. Taylor, 2 J. J. Mar. 160 (applied to the description in a patent):

¹⁴ The line when marked throughout must govern, however devious or variant from the course. (Mercer v. Bate, 4 J. J. Mar. 342.)

¹⁵ Gore's heirs v. Steele's heirs, 4 Mon. 505.

¹⁶ Byrd's devisees v. Fleming's h's, 4 Bibb, 143.

¹⁷ Rays v. Woods, 2 B. M. 222; Ashbrook v. Quarles, 15 B. M. 24. In one case where a deed of partition gave a line from corner to corner, which if run in a straight line would have left a spring altogether to one of two parties, evidence was admitted that the line was actually run on the ground along the middle of the creek, so as to make it common property. (Lyon v. Ross, 1 Bibb, 466.)

the entries, and the Register has been directed to issue no patent unless where such correspondence exists; and where a patent has issued . . . it must be regarded as conferring *record evidence of title*, which will stand until its *variance* from the entry as well as the extent thereof shall be *clearly, satisfactorily, and conclusively shown* (as is said further) beyond a *rational doubt*."

The survey as called for in the statutes is made when the sworn official surveyor runs the lines and marks the lines and corners, not when he puts the plat into shape and writes out his certificate; the work on the field determines the date of the survey;¹⁸ the time of making the plat and certificate (which should be dated back to such date) are material only in connection with the returning and recording.

A survey made in fact, though on a "vague" and therefore worthless entry, under the act of February 19, 1808 (and probably some other land acts), had this beneficial effect, that no "removed certificate" of a head-right could be located within it (and so as to some other "claims"); should a new location be made within it, that and the patent thereon would be utterly void.¹⁹

The report of a surveyor made under the land laws is evidence that the objects named therein existed at the time, which, when the objects are permanent, proves their position.²⁰

Both entries and surveys, as well under Virginia as under Kentucky laws, and the warrants on which entries and surveys were founded, were always assignable, and very many patents were issued to assignees.

SEC. 56. THE PATENT. The following is the form of a Virginia patent prescribed by the act of 1779, a form borrowed in the main from the old royal patents, and followed as far as applicable to this day :

"A. B., Esq., Governor of the Commonwealth of Virginia,

¹⁸ Hickman v. Boffman, Hardin, 348, 358. A survey made for Hickman, by marking the trees in 1775, is protected by the act of 1779 as a past survey, though the assistant

surveyor returned the plat to his principal in 1780.

¹⁹ Winn v. Davidson, 5 Mon. 163.

²⁰ Crockett v. Greenup, 4 Bibb, 160.

to all to whom these presents shall come, greeting: Know ye, that in consideration of military service performed by C. D. to this Commonwealth (or in consideration of military service performed by C. D. to the United American States, or in consideration of the sum of ——— current money, paid by C. D. into the treasury of this Commonwealth, etc.), there is granted by the said Commonwealth unto the said C. D. a certain tract or parcel of land containing ——— acres, lying in the county of ———, and hundred of ———, etc. (describing the particular bounds of the land and the date of the survey upon which the grant issues), with its appurtenances, to have and to hold the said tract or parcel of land with its appurtenances to the said C. D. and his heirs forever. In witness whereof, the said A. B., Governor of the Commonwealth of Virginia, hath hereunto set his hand, and caused the seal of the said Commonwealth to be affixed at ———, on the — day of ———, in the year of our Lord ———, and of the Commonwealth ———. A. B.”

The “grant” (so the patent is called throughout this act) is to be prepared by the Register, and indorsed by him that “the party hath title to the same,” and is then signed by the Governor and sealed.¹

Upon the separation of Kentucky from Virginia, this form was only changed by substituting the name of the younger for that of the older Commonwealth. Once only a temporary act allowed another official to sign patents in place of the Governor.²

A patent being issued under the Great Seal of the Commonwealth imports absolute verity. If improperly issued, the Commonwealth may, succeeding to the former rights of the Crown, have it revoked by *scire facias*; and it was said that, on the relation of a party injured, such writ ought to be issued;³ but this course has been attempted in only one reported case. Only where a statute says that a patent issued in a given state

¹ Litt. Laws of Kentucky, I, 415.

² Act of 1834, naming the then Assistant Secretary of State, M. & B. Statutes, Vol. II, 1436.

³ Taylor v. Fletcher, 7 B. M. 80, 82, *arguendo*. So again, M'Mill v. Hutcheson, 4 Bush, 613, and Marshall v. McDaniel, 12 Bush, 381.

of case shall be *void* or shall be *fraudulent*,⁴ can it be assailed collaterally. Of course, where patents are not void, still two patents can not effectually convey the same land; the first in time only can operate on the "interference." In that case the junior patent, though it can not operate as a grant of land already granted, is not void.⁵ As is said in a case already quoted, "a patent, when it appears on its face to be illegal, may be considered as void and treated as a nullity;"⁶ yet, where a law (Revised Statutes, Chapter 102, Section 3) restricted all grants thereafter to two hundred acres, a patent professing to be issued under that law showed by its courses and distances a grant of about three hundred acres, the Court of Appeals refused to declare it void, in whole or in part.⁷

That the issuance of the patent is forbidden, or that the entry or survey on which it is founded were void, or that the grant is declared inferior to other titles,⁸ is not sufficient to render it void.

⁴ *Ibid.*, *arguendo*, quoting *Dallam v. Handley*, 2 Mar. 218, and *Sutton v. Menser*, 6 B. M. 433.

⁵ See *infra*, under *Seven Years' Limitation and Occupying Claimants*.

⁶ 7 B. M. 82.

⁷ "The metes and bounds, courses and distances are the highest evidence of the number of acres the Commonwealth intended to convey." (*Frazier v. Frazier*, 81 Ky. 137). In *Bledsoe v. Well*, 4 Bibb, 329, a patent on a Kentucky treasury warrant on land within the "military" district was held not void because the defect did not appear on its face, though it might be apparent to one versed in geography.

⁸ *Atchley v. Latham*, 2 Litt. 362. Under last section of act of 1811 (M. & B. Stat., Vol. II, 915), the last time for extending time on Virginia claims, patents on Virginia entries not surveyed on or before November 29, 1798—saving disabilities, etc.—are

void; on evidence that the patent did not come within the exceptions, grant held void. *Pearson v. Baker*, 4 Dana, 322: Act of 1831 (M. and B. Stat., p. 1037), forbidding surveys or grants on "enclosed or cultivated" lands, does not declare them void in so many words, hence a patent good at law though the settler might be relieved in equity. *Cain v. Flynn*, 4 Dana, 501: Patent can not be avoided by parol proof that survey was not executed within time stated, this being under an act making the patent refer back to date of survey. *Ray v. Barker*, 1 B. M. 301, under act of December 20, 1820 (M. and B. Stat., II, 1043: "Patent issuing on survey made contrary to the location" is void to extent of its variation. *Sutton v. Menser*, 6 B. M. 432, under act of February 8, 1815 (M. and B., II, 981), as to seminary claims, and preceding act of February 2, 1814, patent on prior location is void. *Taylor v.*

The statutes which render patents void in certain cases are the following: The sixth and last section of the "act to revive the law for allowing longer time for receiving plats," of January 25, 1811, as all "grants not founded on an entry made within the time allowed by law for making such entry or entries, and surveyed on or before 29th of November, 1798, shall be void." Then follow exceptions for disability.⁹

"An act to prevent the fraudulent appropriation of lands under color of treasury warrants," of February 11, 1809, forbids the issuing of patents founded on treasury warrants, unless the surveys are indorsed with a certificate that they are not within the "military reserve," or, if the survey be in Knox or Pulaski counties, that the land is not in the region gained by the Treaty of Tellico; patents issued "contrary to the true intent and meaning of this act" to be void.¹⁰

We have shown above that this statute was disregarded by the court on the plea that the illegality of the patent did not appear on its face (n. 7). (But an act of December 23, 1803, for the protection of head-right settlers, says in Section 2 that a military claim knowingly laid on the land granted to a settler shall be void, and the warrant thereby become invalid")

Fletcher, 7 B. M. 80, under act of 1820 (M. and B., II, 1343): patents on military entries on a false survey are void; but patents west of the Tennessee River under Kentucky claim, conflicting with a military entry, though forbidden by acts of 1821 and 1825 (*ibid.* p. 1057), are not void. Little v. Bishop, 9 B. M. 246: patent under act of 1835 not void because its recitals do not show clearly that it was issued on proper authority, as long as they do not negative it. McMillan's heirs v. Hutcheson, 4 Bush, 615: The act of 1835—see *infra*, "Modern Grants"—which grants all vacant lands to the counties and directs patents for their benefit to purchasers, declares all patents on land that is not vacant *null and*

void. The word *null* was said, in Jennings v. Whitaker, 4 Mon. 51, to be added to show that "void" is not to be read "voidable." Bowman v. Eggner, 7 Bush, 68: The acts of 1829 and 1830 (M. and B. 1061-1064) forbidding the sale west of the Tennessee River of less than a quarter section or fractional quarter section, do not make a patent for a smaller quantity void. Clark v. Jones, 16 B. M. 121: patent under Kentucky treasury warrant law of 1815, when land had been entered before, though made inferior even to a "vague" entry, is not void within the meaning of the seven years' limitation act.

⁹ M. and B. Stat., Vol. II, 917.

¹⁰ M. and B. Statutes, Vol. II, 920.

as a penalty for the attempted fraud—it does not say that the patent issuing shall be void in consequence.)”¹¹

An act of 1814, concerning Seminary Lands: “All locations and surveys made, and grants obtained under the provisions of this act, so far as the same may be found to interfere with any of the claims aforesaid (including 200 acres held by actual settlers) shall be entirely null and void.”¹²

An act of 1818, concerning land below the Tennessee River, just then acquired by Indian treaty, says that, “No patents be issued; any patent issued contrary to the act to be void.”¹³ This region is opened up by later laws. See also the statutes treated in the next following section under the head of “Modern Grants.”

While, as a rule, a patent takes effect from the day on which it is issued, the Treasury Warrant Act of Kentucky, of February 6, 1815, established a new rule for all patents that should be granted under that act or its amendments in the following words: “The actual survey shall be considered the commencement of the title; and when perfected by grant the title shall relate to the time of survey, so as to be available in courts of law against an older grant founded upon a younger survey.”¹⁴

In the case of an obscure description the patent may be helped out by the survey, which is matter of record, and thus of equal dignity with the grant.¹⁵

The act of December 22, 1792 (Section 4), already mentioned, directs “that where grants were or shall be issued to persons already deceased, the land” shall descend to the heir, heirs, or devisees, etc., “as if made in the lifetime of the grantee.” The Revised Statutes, and again the General Statutes, re-enact this law with the unfortunate omission of the word “devisees,” but render it clearer by the clause “as if such patent had been issued . . . to such heirs by name.”* These acts are rightfully retrospective,¹⁶ for without them the grant would be void, and

¹¹ *Ibid.* 949.

¹² *Ibid.* 1007.

¹³ *Ibid.* 1040.

¹⁴ M. and B. Stat., Vol. II, p. 1022.

¹⁵ *Beckley v. Bryan*, Pr. Dec. 91.

¹⁶ Litt. Laws Ky., I, p. 160; Rev. Stat., Ch. 46, Art. I; Gen. Stat., Ch. 50, Art. I. The Rev. and Gen. Stat. apply not to patents only, but to all deeds.

the land remain in the Commonwealth. The heirship must be determined by the law as it stood at the date of the patent.¹⁷

But where the Commonwealth had, before December 22, 1792, granted the land to another, that act can not operate to divest the latter's title; as the grant to the dead man being void at common law, the second patent was effective.¹⁸ The dead man's grant, if older, is read as if dated December 22, 1792, for all purposes.¹⁹

The modern statute, which omits devisees, has been construed to give the legal title to the heirs in trust for the devisees, who become the beneficial owners.²⁰ In some of the quoted cases the patentee appeared to be dead at the date of the entry or survey: but this was deemed immaterial.

Much has been said lately about "inclusive" or "blanket" patents. The eighty-sixth section of the Virginia land act of June 2, 1788,²¹ legalized them thus: "Whereas, sundry surveys have been made . . . which include in the general courses thereof sundry smaller tracts of prior claimants, and which in the certificates granted by the surveyors of the . . . counties are reserved to such claimants; and the Governor . . . is not authorized by law to issue grants upon such certificates. . . . *Be it enacted* . . . That it shall . . . be lawful for the Governor to issue grants with reservation of claims to lands included within such surveys, etc." The early Kentucky cases of "inclusive" surveys and patents name the prior claimants, and thus identify the excluded parts, or at least furnish the means for identifying them. Those claiming under such a patent and seeking to recover land comprised in the "outer boundary" have the burden of proving that the land sought to be recovered is not embraced within the prior claims.²² If this be a hardship, the patentee has deserved it by not running out all the lines which separate him from the excluded tracts inside of his own. In Virginia, however,

¹⁷ *Skeene v. Fishback*, 1 Mar. 856;
Hansford v. Minor, 4 Bibb, 385.

¹⁸ *Lewis v. McGee*, 1 Mar. 199.

¹⁹ *Russell's heirs v. Mark's heirs*, 3 Metc. 87.

²⁰ *Cobb v. Stewart*, 4 Metc. 255.

²¹ Litt. L. Ky., I, p. 460. *Quære*: Does this law apply to any but Virginia claims?

²² *Madison's h's v. Owens*, L.S.C. 281.

such patents were sustained, although the exclusions were stated in acres only, without being identified by the name of the claimants; and an early Virginia case proposes to give to the holder of the "inclusive" patent every thing within his outline for which there is no valid prior claim. But this doctrine has since been reprobated, both by the Supreme Court of the United States²³ and the Supreme Court of West Virginia.²⁴

The United States Supreme Court intimates that there is no reason, when a man pays for a smaller quantity of land, and has a larger area surveyed and patented to him, "exclusive of prior claims," why the State should not sell the unpaid residue to some one else, if the prior claims lapse or turn out to be invalid.

In Kentucky the question on a patent with unnamed exclusions came first before the Court of Appeals in 1883. A patent was declared void, which granted, within definite outlines, 74,876 acres "excluding 60,518 acres prior grants," without identifying the latter in any way.²⁵ Thus the holder of warrants for 14,353 acres had undertaken to gather in all vacant lands within five times that area. The judgment aroused discontent and surprise, as these "blanket patents" were quite common. But it was followed in 1884: here the patent purported to grant 4,000 acres, while the lines included over nine thousand, by "excluding all surveys of record in the above boundary." The court said: "If 5,000 acres could be thus taken within the sweeping lines of a survey, equally well could one fourth of the State."²⁶ The effect of these decisions was weakened, when in 1885 the court ruled, that though a patent containing the words, "there is 21,520 acres excluded the above boundary" is void; yet, while it is uncanceled the lands covered are no longer "vacant," and the surveyor ought not to survey them for any one else.²⁷ And

²³ *Armstrong v. Morrill*, 14 Wall. 148.

²⁴ *Bryan v. Willard*, 21 W. Va. 65, practically overruling *Hopkins v. Ward*, 6 Munf. 38, and following

Nichols v. Corey, 4 Rand, 365.

²⁵ *Hamilton v. Fugett*, 81 Ky. 366.

²⁶ *Hillman v. Hurley*, 82 Ky. 626.

²⁷ *Roberts v. Davidson*, 83 Ky. 281.

in June, 1889, the court, professing not to overrule but to distinguish these cases, upheld a patent which by well defined lines inclosed 1,248 acres, and excluded therefrom the "number of acres contained in prior grants," without even stating the number.²⁸ These were afterward surveyed, as shown in the cause, and thus a false appearance of certainty arose. The court insisted that the exemption of prior grants was no more than what the law implied; and as the number of excepted acres is not stated, the patentee must have paid for the full number, 1,248 acres, which is the best ground upon which to rest the decision.

SEC. 57. MODERN GRANTS. On the 8th of February, 1835, the passage of "An act to appropriate the vacant lands in this Commonwealth east and north of the Tennessee River to the counties in which they lie, for the purpose of internal improvement," to go into effect on the 1st of August of that year,¹ ushered in a new era in the disposition of the vacant lands of Kentucky. With the exception of the small western end of the State, which remained under its special laws, one rule governed all vacant lands. Though the proceeds of the lands were appropriated to the counties, and the price fixed by the County Courts (not to be less, though, than five cents per acre), the issue of patents remained with the Register of the Land Office, and they still bear the signature of the Governor and the seal of the State. At first it was directed that the County Court should agree upon the price with each purchaser, but this policy was soon abandoned. As amended by acts of 1836 and 1837,² the law stood in the main thus:

Each County Court fixes the price of all vacant lands within the county at five cents or over; the applicant for land pays to the county treasurer the price for as many acres as he desires, and takes his receipt, which he carries to the county clerk; the latter issues and records a "warrant" for the number of acres; this warrant being shown to the surveyor, he surveys as much vacant land in the county as the warrant calls for, under the same rules as under the law of 1815 regarding

²⁸ Hall v. Martin, 11 Ky. Law. Rep. 241.

¹ Loughb. Stat., p. 386.

² Ibid. 387, 388.

treasury warrants (the main rule being first come, first served), and when the plat and certificate of survey is shown to the Register of the Land Office he makes out the patent. There is nothing here that corresponds to the "entry" under the Virginia law. (Those parts of the law which deal with the disposition of the proceeds of sale lie outside of the scope of this work.)

A clause in the fourth section of the act of 1835 indicates that a number of special laws granting certain vacant lands to one or the other county for similar purposes had been passed before them.

The policy of the treasury warrant law of 1815, not to let the new grants come into conflict with any older rights were here carried to the utmost. "No appropriation of land under this act shall prevail against any actual settler including to his boundary, whether (he) has any title in law or equity deducible from the Commonwealth or not, provided he has either a deed or bond for the land; and every survey or patent which interferes with the settlement or boundary of any such actual settler *shall be utterly void*." This has, however, been construed to mean void only to the extent of the interference, and valid as to the residue.³

The act shall not "apply to any land stricken off to the State for non-payment of taxes, or forfeited for non-entry for taxation; and any survey or patent made or issued under this act, which interferes with any survey heretofore made or issued, shall be *null and void*."

As these modern patents are void when they interfere with an older patent, the occupant of land can not deduce title from the Commonwealth, through one of the former, and can not bring himself within the seven years' limitation law:⁴ of which hereafter.

No change in the general features of these laws was made before the enactment of the Revised Statutes. But by an act of February 20, 1844,⁵ the County Courts of thirty-two named counties, embracing the greater part of all the still vacant

³ Hartley v. Hartley, 3 Met. 59.

McMillan v. Hutcheson, 4 Bush, 611.

⁴ Little v. Bishop, 9 B. M. 240-246;

⁵ Sess. Acts, 1843-1844, p. 82.

lands, were authorized to lower the price of lands to \$2.50 for each one hundred acres.

In the Revised Statutes (taking effect July 1, 1852) the matter of these laws is cast into a chapter entitled "Treasury Warrant Claims," and numbered 102. The following new features are introduced:

1. An actual settler has a pre-emption right to have not more than one hundred acres laid off to him in a square; but one wishing to locate upon land settled upon may, by giving a notice of three months, obtain the right to have such land surveyed, unless the settler himself should "enter and survey" it. This provision is taken from the old treasury warrant law, and was probably understood to be, by reference, a part of the acts of 1835 and 1837.

2. Warrants are to issue for not less than twenty-five nor more than two hundred acres. It was held in 1872 (Judge Pryor dissenting), that nothing in the law prevented the same man from having any number of warrants of two hundred acres each issued and surveyed in the same county, and to demand patents at the Land Office on each of them.⁷ In pursuance of this decision speculators had very large tracts surveyed in several of the "mountain counties," one man taking up no less than 250,000 acres in Perry and Letcher counties. In the following year the mischief was remedied by the General Statutes.

3. The land called for in one warrant may be had in either one or in several parcels.

4. The "entry" is again introduced in this wise: "The party obtaining (the County Court) order may, by an *entry* in the surveyor's book of the county describing the same, appropriate the quantity of land it calls for," and the survey must be made within two months (that is, less than two months)

⁶In Loughborough's compilation the act of 1835 and its amendments are headed "Internal Improvement Claims," the name of "Treasury Warrant Claims" being deemed appropriate to those originating under the

act of 1815, which provided for payments into the treasury. In Stanton's Revised Statutes the chapter begins Vol. II, p. 430.

⁷Register v. Reed, 9 Bush, 103.

after entry, and a plat and certificate of survey lodged in the Land Office within four months after the survey is made.

5. A patent may issue on the survey *within* three months after the plat, certificate, and copy of order are filed in the Land Office; and here *within* evidently means "at least," the time being required to enable others deeming themselves aggrieved to file a *caveat* against the issuance of the patent.

6. "The legal title of the land shall bear date from the time of *making* the survey" (*i. e.*, marking the boundaries).

No escheated or forfeited lands, or lands that have ever been patented and have reverted to the Commonwealth, can be appropriated under this chapter. The reduction of price in thirty-two counties is impliedly repealed, and the County Treasurer is dispensed with; but an act of March 9, 1854,⁸ reduces the price again in sixteen mountain counties to 2½ cents per acre, and an act approved on the next day⁹ extends the time for making and for returning surveys, each to six months. An act approved February 13, 1858, to remove all doubts, declares that the lands west of the Tennessee River are not affected by the Revised Statutes.¹⁰

The General Statutes of 1873, coming into force on the 1st of December of that year, treat the same subject in Chapter 109, "Treasury Warrant Claims." This chapter agrees with that of the Revised Statutes as amended, except in the following particulars:

1. No one person shall, under this chapter, enter, survey, or cause to be patented more than two hundred acres in any one county. This seems to prevent the same person from acquiring more than one survey by assignment, and the titles are only freely assignable after having been completed by patent. An amendment of 1878 makes the "plat and certificate" assignable, yet no one is to have a patent for more than two hundred acres in one county in one year.¹¹

⁸In practice this "entry" is a rough description of the land, like the Virginia entry; often, when made by lawyers or surveyors, a correct description. It seems that there has been no occasion for establishing

such entries by suit as equities in the land.

⁹Stanton's Rev. Stat., II, p. 432.

¹⁰*Ibid.*

¹¹*Ibid.* 434.

¹²B. & F. Gen. Stat., p. 1250.

2. When "the survey was made six months before the same was deposited with the Register, the title shall take its effect from the patent only, and not refer back to the survey."

3. The reduction of price which had been made in sixteen counties is repealed by implication.

By act of May 1, 1886, the lands between Walker's line and the parallel $36^{\circ} 30'$ are given to the adjoining counties with power to sell at any price the County Court chooses to put upon them, and in any quantity, the object being to get rid as soon as possible of the State ownership of land in another State.¹⁸

Little if any vacant land is left in Kentucky; much has been patented more than once, and more than twice. There is no check by regular subdivision, and neither the county surveyor nor the Register of the Land Office can know officially whether land of which the survey or grant is asked has not been patented before. Many patents have been taken out only to give color of title, so as to carry the effect of possession under the limitation laws to a marked boundary. It is believed that in one county (Breathitt) more than twice the area has been listed for taxation, claimants being willing to strengthen their color of title thus at the expense of a trifling State tax.

NOTE.—An act of February 20, 1836, not found in Loughborough's Statutes, gives to the counties along the Tennessee line, from Allen in the west to Whitley in the east, inclusive, the vacant lands north of $36^{\circ} 30'$ respectively opposite to those counties; warrants upon demand to be issued to those counties without payment of the State price: and these warrants, or the surveys made upon entries under such warrants, to be assignable; and patents to be issued by the Register of the Land Office to the assignees. The character of the patent seems to be governed by the laws on treasury warrant claims, as applied by laws enacted in 1824, 1825, and 1827 (M. & B. 1028-1034), to the Tennessee strip, and not by the laws treated in Section 57, under the head of Modern Grants. (See Sess. Acts, 1835, p. 307.)

¹⁸ *Ibid.* Ch. 64a, p. 840.

CHAPTER X.

DEVOLUTION OF LANDED ESTATES.

SEC. 58. Descent.

SEC. 59. Conveyance.

SEC. 60. The Older Recording Laws.

SEC. 61. The Modern Recording Laws.

SEC. 62. Powers of Attorney.

SEC. 63. Conveyance under other Powers.

SEC. 64. Devises.

SEC. 65. Statutory Extension of Powers.

SEC. 66. Title by Estoppel.

SEC. 67. Champertous Conveyances.

SEC. 58. DESCENT. The laws of Virginia did away with the right of the first-born by an act of 1785, taking effect January 1, 1787, before much land in Kentucky could change title by the death of the owner. The first Kentucky act on the course of descents was passed in 1796,¹ and is copied from Virginia Statutes of 1785 and 1790. Under it the rules that have since *in the main* governed the course of descent are thus set forth: "Real estate of inheritance" shall descend "in parcenary" to the kindred of the decedent, male and female; *first*, to his children or their descendants, if any there be; *next*, to his father; *next*, "to his mother, brothers, and sisters, and their descendants, or such of them as there be;" *next*, the estate to be divided into two halves, one to the paternal, the other to the maternal kindred, on the same principle of seeking out the male ascendant first, and if there be none, letting the estate go jointly to the female ascendant and her issue.

¹ Litt. Laws Ky., Vol. I, p. 557; M. and B. Statutes, Vol. I, p. 562, preceded by the Virginia acts of 1785 and 1790. Before January 1, 1787, when the act of 1785 came in force, the eldest son or brother was the sole

heir (Roberts v. Elliott, 8 Mon. 397), and among collaterals the whole excluded the half-blood (Bowlin v. Pollock, 7 Mon. 42). The rule as to ancestral estate of infants is first given in 1790.

If there are no paternal or no maternal kindred, the whole estate to go to those there are, "and so on without end;" if none of either kind, to the husband or wife. Among collaterals of the whole and the half-blood the latter take half portions; between ascendants and half-blood collaterals the former take a double portion, which shows that the mother was not to have one half, but only a brother's share. Children or collaterals in the same degree, or sharing only with a female ancestor, take *per capita*; where part are alive and others dead and represented by issue, they take *per stirpes*. Unborn children only of the intestate himself can inherit. Descent may be derived through an alien. Bastards "may inherit or transmit inheritance on the part of their mother," which peculiar phrase is copied into the latest statutes. Children born before wedlock are legitimated by marriage and recognition. The issue of marriages "null in law" is to be legitimate, which was held to include the child of a formally solemnized marriage, though a former husband of the bride was living.² No parcener has any privilege over another. Advancements must be brought into hotchpot with estate descended. A distinction between ancestral and other lands is allowed where an infant dies without issue, but is extended beyond the common law to lands derived by such infant "by *purchase* or descent from his father," when the mother or her children by another father are excluded, and *vice versa*, while there are brothers or sisters of the decedent or of the transmitting parent or their issue. The words "on the part of the mother," as to bastards, having been first narrowed down so that there could be no transmission between a bastard and his uterine brother³ or his mother's brother,⁴ were finally held to mean no more than to or from his mother, not even from his mother's father. This was under the clause of the Revised Statutes copied from the act of 1796.⁵ But the

² Sneed v. Ewing, 5 J.J.M. 460, 491.

³ Scroggs v. Allan, 3 Dana, 364, following Stevenson's heirs v. Sullivant, 5 Wheat. 207; followed in Remington v. Lewis, 8 B. M. 606.

⁴ Allen v. Ramsey, 1 Metc. 635. A

natural son, recognized by the father and legitimated by act of the legislature, in 1848, is "issue" for all purposes of the law. (Berry v. Owen, 5 Bush, 453.)

⁵ Jackson v. Jackson, 78 Ky. 390.

legitimate children of bastards represent their parents, and may inherit through them from any one these could themselves inherit from.^{5a}

An act of 1840, copied in the two revisions, allows bastard children of the same mother to inherit as brothers and sisters from each other,⁶ but this can not help a legitimate son claiming a bastard's estate, or *vice versa*.⁷

Where an infant transmits ancestral estate to his brother or sister, it is no longer ancestral in their hands, hence on the death of such brother or sister those of the whole blood get shares double as great as those of the half-blood, and the mother takes the share of a full-blood brother.⁸ Where a father leaves shares in his land by will or intestacy to two infant children, and by the death of one the whole or a part of his share goes to the other, who thereupon dies, his share, coming through his brother, is not ancestral, but follows the ordinary law of descent.⁹ Nor is the statute extended by construction to lands derived from a grand-parent.¹⁰ It is strange that it should have been seriously contended in several cases that the exclusion of "the mother and her children" or the "father and his children" should inure to the benefit of the more distant kindred on that side, and not to the brothers or sisters by the parent from whom the land came; and such a contention was, of course, rejected.¹¹ The statute was narrowly held down to its terms, and not extended in accord with the common law rule of keeping the inheritance in the blood of the first purchaser. Hence, land coming from the father, the mother only could be excluded in

^{5a} Sutton v. Sutton, 87 Ky. 216.

⁶ Loughborough, p. 211, Rev. Stat., Chap. 30, Sec. 5; General Statutes, Chap. 31, Sec. 5.

⁷ Remington v. Lewis, just quoted.

⁸ Talbott v. Talbott's heirs, 7 B. M. 9; Milner v. Calvert, 1 Metc. 475. See result figured out in Gill v. Logan, 11 B. M. 231.

⁹ Driskill v. Hanks, 18 B. M. 863.

¹⁰ Smith v. Smith, 2 Bush, 522: de-

cided under the Rev. Stat., in which one section, speaking of "one of his parents," is substituted to the two sections in the act of 1796 speaking about "his father" and "his mother." But the same principle was upheld under that act in Duncan v. Lafferty's adm'r, 6 J. J. Mar. 46.

¹¹ Renfroe v. Taylor, 12 B. Mon. 404, and cases there cited.

favor of the father's brothers, she being named, but not the mother's children, half brothers to the decedent.¹² And, of course, if there were no kindred on the favored side of the kind named in the act, no discrimination could be made.

The chapter on Descents in the Revised Statutes (1852) introduces some further changes in the law of 1796 (for last point see Chapter 47, Article I, Section 3):

1. "When any or all of a class first entitled to inherit are dead, their descendants take *per stirpes*." The words "or all" are new.

2. "Any person born within ten months after the death of the intestate shall inherit from him, etc.," while under the old law only the intestate's own posthumous children could take.

3. "When a person dies intestate without issue, having real estate of inheritance, the gift of either of his parents, such parent, if living, shall inherit the whole of such estate."

4. In case of infants dying without issue ancestral estate is defined as that "derived by gift, devise, or descent from one of his parents," and such estate is made to descend wholly to the kindred on the favored side, thus excluding not only the opposite father or mother, but all kindred claiming through such father or mother; and this if on the favored side there be any one as near as a *grand-parent*, uncles or aunts, or their descendants.

5. The rule as to hotchpot and advancements applies to "real or personal estate or money given or devised by parent or grand-parent," which is estimated at its value when given; maintenance or education, and money given without view to a portion or settlement is not an advancement (which is also the rule at common law).

6. The issue of a marriage between a white person and a negro or mulatto is void; also the issue of an incestuous marriage, if parents are *convicted*.

The subject of advancements being laid aside for separate treatment, nothing further need be said as to the other stat-

¹² *Clay v. Cousins*, 1 Mon. 75. The court says that descent must rest upon positive law, not upon reason- ing. (See *Wells v. Headly*, 12 B. M. 166.)

utory changes, as they have not given rise to any disputes ending in reported cases.

The next statute affecting descents is the act of February 28, 1860, authorizing the adoption of children by proceedings in the County Court.¹³

The next statute on the subject is the act of February 14, 1866, "in relation to the marriage of negroes and mulattoes," which legitimates the children of those who, while in slavery, lived in "customary marriage." The act allowed such couples to put their marriage relation on record; but it was held that the issue previously born was legitimate without their doing so,¹⁴ and even where one of the parties had died before the date of the law.¹⁵

The General Statutes in force from December 1, 1873, bring some important changes.¹⁶

1. In default of issue, father and *mother* take jointly, if both living; the father alone if the mother is not alive; if there be no father, then the mother takes one *half*; the other half goes to the brothers and sisters and their descendants. If there is no father and no brothers or sisters nor their descendants, the inference from the words of the statute is, that the mother gets one half, and the other half goes to the father's kindred.

2. Grand- or great-grand-parents take jointly, but the survivor among them, without regard to sex, takes the whole share ascending in that line.

3. The rule of the Revised Statutes, which puts all after-born children on the footing of those born in the intestate's lifetime, is changed back, by the awkwardly worded seventh section, to the rule of 1796, applying only to the intestate's

¹³ Myers' Suppl. to Rev. Stat., p. 258. It was held under this act that as long as the order of adoption is not set aside, though proceedings to that end may be pending, the adopted son is the heir and next of kin of the adopter, and the latter's collaterals have no standing which would enable them to contest his will. *Tinker v.*

Ringo's executors, 11 Ky. Law Rep. 120 (to be reported).

¹⁴ Myers' Suppl. 735; *Whitesides v. Allen*, 11 Bush, 23.

¹⁵ *Brown v. McGee*, 12 Bush, 429; and this though one of the parents was free.

¹⁶ Ch. 31, Secs. 1, 7, 17.

own child. It is doubtful, though, whether it will be construed in this restricted sense.

Adoption of children by proceedings in the County Court, as provided for by law of 1860, is re-enacted; the act of 1866 as to "customary marriages" having had its irrevocable effect, when passed, is omitted. An amendatory act of February 9, 1874, gives to the mother the whole estate when there is no father and no brothers or sisters or their descendants.¹⁷

Under every law of descent the first question is always: Is the ancestor dead? which calls up the well-known rule about the presumption of death after an absence of seven years from the State. It was held, that where a man had gone from Kentucky to Missouri to join the Mormons, and had not been heard of *in Kentucky* by his friends there for seven years, that this raised no presumption of death: which leaves very little of the old rule.¹⁸

The other question is aside of that of legitimacy or bastardy: Is the proposed heir the son of him from or through whom he claims? A late opinion (November, 1889)¹⁹ to which we refer our readers for the facts, makes a pretty wide breach in the old doctrine: *Pater est quem justæ nuptiæ demonstrant*.

As to aliens, the common law having been modified in 1796 so as to permit the title to pass from citizen to citizen through an alien, was further relaxed in 1800²⁰ so as to permit aliens who have lived in the State two years, thereafter to pass or take lands by descent; this was re-enacted by the Revised Statutes;²¹ an act of March 21, 1861, removed the disability to inherit or transmit lands entirely;²² an act of March 9, 1867, restored the older laws so modified as to make a "declaration of intention" the test instead of the two years' residence; this was re-enacted by the General Statutes;²³ but an act of February 23, 1874, removes the disability in favor of those aliens

¹⁷ B. & F. G. St., p. 480.

¹⁸ Gray v. McDowell, 6 Bush, 475.

¹⁹ Foss v. Froman, 11 Ky. Rep. 631; disregarding the argument from Gen. Stat., Ch. 7, Sec. 1.

²⁰ Mor. and Br., Vol. I, p. 112; Litt.

Laws Ky., Vol. II, p. 399.

²¹ Revised Statutes, Ch. 15, Art. III, Sec. 1.

²² Myers' Suppl., p. 85.

²³ Sess. Acts, 1867, p. 98; Gen. Stat., Ch. 14, Art. III, Sec. 1.

whose home country allows citizens of Kentucky the right to transmit and inherit lands within its own borders.²⁴ This takes in all subjects of Great Britain, while citizens of Germany and Switzerland are protected by national treaties, the competency of which has been expressly recognized.²⁵

NOTE.—As to the equality of posthumous with other children, see case at end of Section 76.

SEC. 59. CONVEYANCES. The common law methods of conveyance by livery of seizin, fine, or common recovery were never in use in Kentucky. Its eldest land transfers were governed by the Virginia Statutes of 1748 and 1776, the latter of which is of importance only as far as it clothed the holder of a deed from the commissioner of a court with the legal title, and under a section of that statute such titles mainly depended till 1851.¹ The first Virginia act to be treated more fully is that of 1785 (in force from January 1, 1787), based on those preceding it. Under this law a freehold or a lease for more than five years can pass only by deed, that is, by writing sealed and delivered. Proof or acknowledgment and recording is required only in order to give to the deed priority over a "purchaser without notice, or any creditor."² But the act of 1748 was also construed to pass title between the parties by the mere delivery of the deed.³ It is otherwise as to married women; but excepting them, this transfer of the legal title by a deed delivered, though never proved or acknowledged, has been the law of Kentucky ever since. The seal is necessary to pass the legal title, and remained so⁴ after executory contracts without seal had been put on the footing of sealed instruments by an act of Assembly in 1812.⁵ And where a deed is made by attorney, the power of attorney must be sealed, else the title will not pass at law.⁶ By Section 40 of the prac-

²⁴ B. & F. Gen. Stat., p. 247.

²⁵ Yeaker v. Yeaker, 4 Metc. 39.

¹ Mor. and Br., I, 429, 454.

² *Ibid.* 432.

³ Fitzhugh v. Croghan, 2 J. J. Mar. 429, 433, as to a deed made by Trustees of Louisville in 1783.

⁴ The cases already quoted of tax deeds by the Register, Doty v. Bensly, 2 Bibb, 15, and Shortridge v. Catlet, 1 Mar. 587, express the rule generally.

⁵ Mor. and Br., I, p. 343, Sec. 8.

⁶ Plummer v. Russell, 2 Bibb, 175.

tice amendment act of 1796⁷ a scroll is made sufficient as a seal.

The decision that several obligors to a bond may adopt the same scroll as their seal would apply to several grantors in a deed.⁸

In 1843, by act of January 23d, it was enacted that "every instrument hereafter executed shall be as effectual and have the same dignity in law without a seal or scroll as with one," retaining, however, the necessity for State and county seals, and for the seals of corporations. This law applied to executed contracts the same rule which an act of 1812 had applied to executory contracts.⁹ ♦

Delivery is essential; there can be none without acceptance. In a late case this rule was carried further than the Supreme Court of the United States would carry it. The owner of land having made a mortgage in favor of several creditors, without the intervention of a trustee, the deed was put to record without the knowledge of one of these creditors, who was absent, or of any agent of that creditor. Before this creditor learned of the mortgage, and so before he could accept it, another creditor attached, and priority was given to the attachment over so much of the mortgage as secured the absent creditor. The delivery to the county clerk was held not a delivery to the grantee.¹⁰

The date of a deed, otherwise proved, is presumptively the date of its delivery, a contrary date being open to proof.¹¹

The deed of an infant (other than a married woman) is, when made upon a valuable consideration, not void, but void-

⁷ Mor. and Br., I, 326.

⁸ Curd v. Forts, 2 A. K. Mar. 119.

⁹ Sess. Acts, 1843, 11. If the common law doctrine that a seal without signature makes a deed, ever practically prevailed in Kentucky, this act made an end of it.

¹⁰ Bell v. Farmers Bank of Ky., 11 Bush, 34, following Commonwealth for Thompson v. Jackson, 10 Bush, 424, 427, where it is said that the presumption of acceptance does not

hold in favor of a grantee ignorant about the making of a deed. See *contra*, Tomkins v. Wheeler, 16 Peters, 106, where the delivery of the deed to the recording officer was deemed sufficient, and Grove v. Brien, 8 How. 429; also, Alexander v. deKermel, 83 Ky. 345, not quoting any of the above cases.

¹¹ Breckinridge v. Todd, 3 Mon. 54; McConnell v. Brown, Litt. Sel. Cas. 464.

able, the doctrine of *Zouch v. Parsons* being fully recognized.¹² A like deed by one of unsound mind,¹³ or by an infant married woman, if the forms as to acknowledgment, etc. (see *infra*), are observed, are only voidable.¹⁴

The estate of a married woman passes by deed, not by record, as it did in a common law fine; the subsequent acknowledgment and record only give force to her deed, sealed (or signed) and delivered.¹⁵

The act of December, 1796, codifying the law of conveyance, aside of directions as to acknowledgment and record, introduces many law reforms which found their way much later into the statutes of other States. It re-enacts the Virginia act of 1776, turning estates tail into fee-simple; *dispenses* both in wills and deeds *with words of inheritance* for passing the fee; allows posthumous children to take by purchase as remainder men; declares that the possession follows a deed of bargain and sale, covenant to stand seized, etc.; subjects estates held in trust (a naked express trust) to debts of *cestui que trust*; allows both curtesy and dower upon an equitable estate; makes grants of rent good without the tenant's attornment, and deprives an attornment to a stranger of all injurious effect.¹⁶

A married woman, when acting under a power or *en auter droit*, can convey as if she was a *feme sole*, without the concurrence of her husband and without privy examination. It was so held where an executrix made a conveyance as such under the powers given in the will.¹⁷ Such a case could not arise now, as ever since 1852 a woman's powers as executrix or administratrix come to an end by the very fact of coverture.

The powers of married women over "separate estate," before the Revised Statutes of 1852, were as full as under the English equity doctrines. She could pass such an estate without privy examination, but it is doubtful whether the recorded deed, not following the statutory rules as to conveyances by

¹² *Philips and wife v. Green*, 3 Mar. 12.

¹³ *Breckinridge's heirs v. Ormsby*, 1 J. J. Mar. 236.

¹⁴ *Bull v. Sevier*, 11 Ky. L. Rep. 82.

¹⁵ *Prewitt v. Graves*, 5 J. J. Mar. 120.

¹⁶ *M. & B.*, I, 437; *Litt. L. Ky.*, I, 567.

¹⁷ *Tyree v. Williams*, 3 Bibb, 368

(1813).

married women, could be treated as validly recorded, and thus as proving its own execution.

The Revised Statutes (1852) and the General Statutes (1873)¹⁸ enact further about conveyances: "The owner may convey *any* interest in land not in the adverse possession of another," which renders all other provisions about estates *in futuro*, etc., needless. Further, a deed is required to convey a term of more than one year, as well as a freehold. The power of married women to convey any interest in land, legal or equitable (of course by complying with the prescribed forms and with the concurrence of the husband) is recognized. She may either join in a deed with the husband or execute a separate deed *after* he has executed his deed. "Nothing contained in this chapter (*Conveyances*) shall be held to enlarge the power of infants or persons of unsound mind." By statute the old rule raising a resulting trust, where one person pays the consideration for land which is conveyed to another, is abolished; a gift is presumed, unless the violation of a trust, or mistake, or fraud can be shown. The statute, however, subjects lands thus conveyed to the antecedent debts of the party paying the purchase money.¹⁹

NOTE.—See Section 56, n. 16, for laws validating deeds made to persons dead at the time. Some rules on construing the description in a deed have been given in Section 55, *Surveys*.

SEC. 60. THE OLDER RECORDING LAWS. The directions for recording deeds, after proof and acknowledgment, are given in the several statutes for the avowed purpose of giving priority as against purchasers and creditors; acknowledgment (not proof) and recording or lodgment for record is also a requisite for giving force to a married woman's deed; but a third effect follows from the lawful recording of the deed, which in the older statutes was not expressed, but implied from them, that the record book, or a certified copy, or the deed itself, with the certificate of record upon it, can be read in evidence without further proof of execution; and this is the matter of

¹⁸ See Ch. 24 of each: Secs. 2, 3, 20, 84 in the Gen. Stat.
20, 21, 35 in the Rev. Stat; 1, 2, 19, ¹⁹ Gen Stat., Ch. 63, Secs. 19, 20.

most interest as to old deeds. Where the statute required a recording within a given time, or acknowledgment before a named officer or in a prescribed way, the deed might nevertheless be valid, but the certificate of acknowledgment and the record are not evidence.¹

The old plan of recording deeds gave a choice between the clerk's office of the county containing the land, or some part of it, and the office of some more central court—a highly unsatisfactory arrangement, which was not finally abrogated till 1852.

The Virginia act of 1785 (January 1, 1787)² directs that the deed must either be acknowledged by the grantor or grantors,³ or that its execution must be proved by three witnesses before the "General Court" (but as to Kentucky lands the court for the District, established by act of 1782, was also eligible), or before the court of the county, city, or corporation in which the land or part thereof lieth, or in the manner thereafter directed, within eight months after sealing and delivery, and be lodged with the clerk of such court, to be there recorded.

This act differs from the former law, in that the act of 1748 demanded "recording," where this only demands "lodging for record." It and the following acts (before 1831) have always been construed that the lodging for record must take place within the eight months, otherwise proof or acknowledgment and record fall to the ground. But if the deed be lodged for record in proper time, though the clerk may improperly hand it back to the grantor, and thus delay the recording beyond the proper time,⁴ or omit copying it into the record book while waiting for the signature or acknowledg-

¹ *Womack v. Hughes*, Litt. Sel. Cas. 292; *Morgan v. Beall*, 1 Mar. 810; *Winlock v. Hardy*, 4 Litt. 273; *Whitaker v. Blair*, 3. J. J. Mar. 236. When regularly certified and recorded in time, the recorded deed proves its own execution: *Barbour v. Watts*, 2 A. K. Mar. 292.

² M. and B. Stat., I, 482.

³ As long as acknowledgments were made in open court, all presumptions would be in favor of validity; thus, if the order only stated that the deed was acknowledged, "by the grantor" would be presumed. (*Phillips v. Ruble*, Litt. Sel. Cas. 221.)

⁴ *Bank of Kentucky v. Haggin*, 1 A. K. Mar. 806.

ment of some other party,⁵ the deed takes, when actually recorded, effect as against purchasers, etc., from the time of lodging, which is no hardship, as deeds lodged for record are open to the inspection of the public.⁶

“If the party who shall sign⁷ and seal any such writing,” the act further says, “reside not in Virginia,” the deed may be proved or acknowledged before the “mayor of any city, town, or corporation of the county in which he shall dwell,” and authenticated by him in the way usual with him, and may be “offered to the proper court for record” within eighteen months, which clause is re-enacted literally in the act of 1796, mentioned hereafter, only substituting “this Commonwealth” for Virginia. The words “shall dwell” are not construed literally, the presence of the grantor before the foreign officer being deemed such a momentary residence as will give him jurisdiction.⁸ And the opinion in the case quoted goes further than the facts; a grantor described in the deed as of Powhatan County, Virginia, having gone before the mayor of Richmond; yet the court refers to the word “reside” in the first part of the section, instead of “dwell” in the latter. A decision of the United States Circuit Court for Kentucky, mentioned in a note in Morehead and Brown, carries the doctrine further, by sustaining a deed acknowledged by a grantor of “Louisville, Ky.,” but acknowledged before a foreign mayor, and lodged for record within the eighteen months.

That the foreign mayor has certified after his usual form will be presumed, where he attaches his official seal.⁹ Of course, the things to be said to and by the *feme covert* are deemed of substance, and not of form.

Where husband and wife join in a conveyance, she must appear in court, and, being examined by a judge, privily and

⁵ Lyne v. Bank of Kentucky, 5 J. J. Mar. 556.

⁶ Modern statutes take care that deeds lodged for record be at once put on some alphabetic index; the old recording laws make no mention of indexes at all.

⁷ The statutes as to recording al-

ways assume that the seal is accompanied by signature.

⁸ McCulloch v. Myers, 1 Dana, 522, and see note to M. and B., I, p. 433, as to the decision in the United States Circuit Court.

⁹ Ewing's heirs v. Savary, 3 Bibb, 237.

apart from her husband, must declare that she did freely and willingly seal and deliver such writing, to be *then shown and explained* to her, and wishes not to retract it; and then she may acknowledge it; but when absent from the county in which the record is to be entered, and within the United States, she may go through the same form before two justices of the peace, empowered by commission (known as a *dedimus*) from the clerk of the recording court, the *dedimus* to be returned with their certificate. Outside of the United States any two judges or justices or a mayor may be empowered in like manner. This *dedimus* as to deeds disposing of the wife's own lands remained indispensable till January 15, 1831, and its omission or miscarriage gave much trouble.⁹

The first Kentucky act was passed December 20, 1792 (in force from its passage¹⁰). Under this act a person about to convey land, who resides in any other county than that in which the land lies, may, with his wife ("if he has one"), acknowledge and subscribe the deed before two justices of the county in which he resides: they are to take *her* privy examination and certify her relinquishment of dower; the deed is to be recorded in the county of residence within four months, and this fact being indorsed on the deed by the county clerk it shall, in eight months thereafter (twelve in all), be *recorded* where the land lies. Thus as to releases of dower the *dedimus* is dispensed with; but if the two justices fail to certify the "subscribing" as well as acknowledgment, which they often did, this certificate and the record are worthless.¹¹

Those residing in another State can act in like manner, and then the intermediate record need not be made, but the

⁹ Phillips and *ux.* v. Green, and under act of 1796 Stansberry v. Pope, 4 Bibb, 492; Still v. Swan, Litt. Sel. C. 156. The words "then shown and explained to her" need not appear in the certificate.

¹⁰ M. and B Stat., Vol. I, 434; Litt. Laws of Ky., Vol. I, 152.

¹¹ Womack & Wilson v. Hughes, Litt. Sel. C. 292; McConnell v.

Brown, *Ibid.* 464. On its face the method given by this act seems inapplicable where there is no wife to join by relinquishing dower, at least not where the grantor has a wife and she does not join. The point, however, was never made (see Barbour v. Watts, *supra*), and would probably have been overruled on reasoning *a majori ad minus*.

“clerk of the county” shall indorse the official character of the two justices on the deed, affixing his seal, which makes the deed recordable. The older methods are not excluded by those given in this act.¹²

Two acts in force from March 1, 1795, allow deeds to be recorded in any “District Court” or in the Court of Appeals;¹³ here the clerk is to take the acknowledgment, not the court, and he may do so for the State at large.¹⁴

The act of 1796 (in force January 1, 1797) on conveyances, already mentioned, codifies former laws with some noteworthy changes. Justices must certify not only under their hands, but hands and seals.^{14a} The returned *dedimus* and other papers belonging to the certificate of a deed must be recorded with it; hence the absence of any thing required from the record is fatal. Though the words “subscribed and acknowledged” are not in the act, they were held still applicable to deeds certified by two justices, as under the act of 1792.¹⁵ The grantor (other than a *feme covert*) can acknowledge his deed, or have it proved outside of the State before any court of law or mayor; if it be done in court, and the deed is recorded in time, the ordinary attestation of the order in court by the clerk, under seal, is good without the certificate of the presiding judge required by the Act of Congress or the Kentucky Authentication Act of 1798.¹⁶ This law does not repeal the allowance of eighteen months granted by the Virginia act of 1785 for offering a deed acknowledged out of the State for record within it.¹⁷

In 1798,¹⁸ the clerks of County Courts and of the Quarter

¹² Parts of this and other old acts referring to release of dower are omitted as obsolete.

¹³ M. and B. Stat., I, 436, 437; Litt. Laws of Ky., Vol. I, p. 567.

¹⁴ Taylor v. Shields, 5 Litt. 295, approving an usage which went far beyond the words of the statute.

^{14a} Deemed material (Thompson v. Robertson, 9 B. M. 386); but a scroll will do, and this is dispensed with by the act of 1843, *supra*.

¹⁵ Taylor v. Bush, 5 Mon. 87; Hyne's repr's v. Campbell, 6 Mon. 289.

¹⁶ Taylor v. Shields, 5 Litt. 295, and so as to the certificate of county clerk as to official character of two justices; Barbour v. Watts, *supra*.

¹⁷ Taylor v. Shields; Blight's heirs v. Banks, 6 Mon. 196.

¹⁸ Act of December 23d, M. and B. Stat., Vol. I, 445, in force from its passage.

Sessions were authorized (in their offices) to take the acknowledgment or proof of deeds, concurrently with their courts, in like manner as the Clerk of the Court of Appeals. This, with neither of them, extended to the deeds of married women.

From December 24, 1802, to June 1, 1807, the clerks of Circuit Courts were also allowed to take acknowledgment or proof of deeds, and to record them in their offices.¹⁹ By the act of January 30, 1810, two witnesses instead of three are allowed to make proof of a deed, and a deed proved or acknowledged in the county of residence need no longer be recorded in it before being sent to the place of final record, and the clerk of either the County Court or of the Court of Appeals and of the General Court may take the acknowledgments of married women.²⁰ But the clerk can not take a valid acknowledgment when the time for recording has passed.²¹ Under this act the wife may acknowledge a deed before the clerk of one county, and the husband before the clerk of another.^{21a}

A married woman may, by deed properly acknowledged and lodged for record, dispose of equitable estates or release covenants running with the land.²²

By a mistake of the certifying officer the certificate would sometimes speak of a married woman's acknowledgment to a deed of her own land as a relinquishment of dower; a deed so certified was void,²³ and the Chancellor would not reform it on proof, by parol, that the clerk explained it in fact to her as a deed of her own estate.²⁴

¹⁹ M. and B. Stat., Vol. I, 445, 446.

²⁰ *Ibid.* 447. The General Court was a court held at Frankfort by two or more of the circuit judges (including the one of the home circuit), in which non-residents were permitted to sue in certain cases.

²¹ *Anderson v. Turner*, 2 Litt. 237.

^{21a} *Gregory's heirs v. Ford*, 10 B. M. 177. The husband must sign before the wife does, but may acknowledge after her. In this case the wife's deed was sustained, though she and her husband re-delivered in 1815 a

deed first delivered and acknowledged by the husband in 1808, and again proved as to his execution in 1815 before the clerk of the county of the land, after she had acknowledged it in the county of her residence.

²² *Whitaker v. Blair*, 8 J. J. Mar. 241; *Wall v. Nelson*, 3 Litt. 395.

²³ *Still v. Swan*, Litt. S. C. 156; see copy of certificate, p 157.

²⁴ *Bennett v. Shackleford*, 6 J. J. Mar. 532.

An infant married woman, having relinquished her dower before the clerk, is not estopped when of full age from suing for it; the clerk's act is not judicial, and need not, like a fine, be assailed by direct proceedings. A deed of the inheritance being then still acknowledged in open court, stands on somewhat different ground—is held open to collateral attack on the ground of the grantor's minority, because the court should, when taking the woman's acknowledgment, have inquired as to her age, and seems to have adjudged her an adult when ordering her acknowledgment to be entered on its minutes. In an old case already quoted (Section 59, n. 12) the question was avoided, but in 1830, under a law authorizing the clerk to take acknowledgments (see below n. 26), it was unhesitatingly decided that the infant's deed was not binding, and it was there stated that even the county courts, when they took the acknowledgment of a deed, acted ministerially. The effect of recording *in time* against subsequent purchasers without notice is this: 'Though the second purchaser lodge his deed for record before the first, the first has priority.'²⁵ That so few conflicts have ever arisen under laws which kept unrecorded deeds good for eight, twelve, and eighteen months is somewhat strange.

The niceties and hardships of the laws regulating deeds of married women were strongly exhibited by a case coming up in 1830,²⁶ which probably led to the liberal statute of 1831. It was there held that the acknowledgment of a married woman, if recorded in time (say within eight months after execution of the deed), would pass her estate though she died in the mean time, but that unless recorded within the time prescribed for other deeds the "relinquishment" (here applied to a deed of the inheritance) will have no effect, "though the acts of Assembly have not *directly* prescribed any specific time" for such relinquishments, leaving them to stand upon the time rule governing other deeds. In this case a sale had to be rescinded because a deed of a married woman was acknowledged but not recorded before her death, and the time for recording was passed.

²⁵ Taylor v. McDonald, 4 Bibb, 421. ²⁶ Prewitt v. Graves, 5 J. J. Mar. 120.

The law was greatly simplified and many old stumbling blocks were removed by the act of January 15, 1831 (in force from its passage).²⁷ Outside of the State acknowledgments, including those of husband and wife, might now be taken before the judge or justice of a superior or inferior court who can conduct a "privy examination." The *dedimus*, the source of so much trouble, is done away with. The certificate of the judge or justice is in all cases to be followed by a clerk's certificate, under seal, to the former's official character. Aldermen of cities (outside of Kentucky), where they exercise such functions, may certify like justices, their official character to be proved, under seal, by the "recorder" or other proper officer of the city; deeds made outside of the United States may be acknowledged before the Chief Magistrate of the State, mayor of a city, or United States Consul,²⁸ and two years are given to record such deeds. A deed not proven or acknowledged at the date of execution may be so proved or acknowledged at any subsequent time; the acknowledgment of a deed (by one *sui juris*) may be established by proof; county clerks may take acknowledgments anywhere within the county; and where a deed is not lodged "in time," but is recorded at a later day, it is good from that day on; that is, such a deed by *baron* and *feme*, which under the old law would have been void, is now operative, and the belated record is proof, which, before 1831, it was not. The only risk in not lodging the deed within the lawful time is that later purchasers or creditors may overreach it. And such the law remained as to all deeds lodged for record after the proper time, till the Revised Statutes, in 1852, restored the stricter rule as to deeds of married women. An act of January 23, 1843, authorized the Governor to appoint Commissioners of Deeds residing in other States, with full powers to take proofs and acknowledgments, such acts being then passed in many or all the States.

An act of February 25, 1848, allows married women to

²⁷ M. and B., I, p. 450. The attempt to cure former deeds of married women, certified by justices having no *dedimus*, failed (see *supra*, Sec. 9, n. 1).

²⁸ Same law in force now. *Quære*: Does the word Consul embrace vice- and deputy-consuls and commercial agents?

relinquish dower by a separate deed, properly acknowledged, after the husband has conveyed the land,²⁹ and by act of February 23, 1849, the same power is given to married women of conveying their inheritance by a separate instrument after the husband has made his deed.³⁰ The same act also declares that certificates of acknowledgment by married women, theretofore made out by the proper officer, shall be *prima facie* evidence that the deed was acknowledged according to all the requirements of the law.³¹

Of course, any act which a clerk may perform, can be performed just as effectually by his deputy.

By acts of 1828, 1831, 1832, and 1833, the power to take acknowledgments was conferred on the mayors of Louisville, Lexington, Maysville, Covington, and Newport.³² These acts are all repealed by the Revised Statutes, if not by charter amendments enacted before 1852. Very few acknowledgments certified by Kentucky mayors can be found.

NOTE.—Those parts of the laws referred to which deal with powers of attorney have been passed over purposely for treatment in another section.

SEC. 61. THE MODERN RECORDING LAWS. The Revised Statutes of 1852 undertake to cover the whole ground on the subject of recording. One great reform is the repeal of the laws allowing deeds to be recorded in the clerk's office of the Court of Appeals or General Court; every instrument must be recorded in the county where the property or the *greater* part thereof lies.¹ The class of deeds to be recorded is enlarged beyond those named in the acts of 1785 and 1792 by the use of these words: "No deed conveying any title to or interest in land for a longer time than five years, etc.," which would embrace deeds creating or conveying an equity.²

The time in which deeds may be lodged for record is put

²⁹ Session Acts of 1848 extended to the Territories by an act of 1849.

³⁰ Sess. Acts, 1849, p. 27.

³¹ Sess. Acts, 1849, p. 19.

³² See section from charter of Louis-

ville and reference to other acts in M. and B. Stat., I, 450.

¹ Chap. 24, Sec. 10; see Gen. Stat., Chap. 24, Sec. 9.

² Chap. 24, Sec. 9; Gen. Stat., *ibid.*, Sec. 8.

at eight months for those "made by residents of Kentucky," twelve months for those residing elsewhere in the United States, and "if out of the United States" eighteen months; a deed lodged later than at these periods is good against purchasers and creditors only from the time of being lodged,³ so that notwithstanding the delay the record is proof of execution. *Quære*: Does the place of acknowledgment fix the residence within the meaning of this law, as under the law of 1785? The point has not come up.

A deed executed in the State is admitted, (1) if acknowledged by the grantor before the recording clerk; (2) if proved to such clerk by two subscribing witnesses, or by one who also proves the attestation of the other; (3 and 4) by proof that both subscribing witnesses are dead or out of the State, and proof⁴ of the grantor's signature, and that of one of the witnesses, or, lastly, on the certificate of a clerk of another County Court that the deed has been thus proved or acknowledged before him, which is appended to the deed, and with it produced to the recording clerk. Deeds made out of Kentucky, and in the United States, may be recorded on the certificate of acknowledgment, or proof made under seal by a clerk of court, mayor of a city, Secretary of State, or Commissioner of Deeds (see Section 59 as to act of January 23, 1843), or a judge under the seal of his court; abroad, when certified by an American Minister, Secretary of Legation, or Consul, or the Secretary of Foreign Affairs, or Judge of a Superior Court of the country.⁵

Only one form of privy examination and of certificate is given for married women. Thus there is no longer a risk of a deed of the inheritance being annulled by being called in the certificate a relinquishment of dower. The form to be followed substantially is given in the Revised Statutes; but it is to be used only by officers certifying deeds outside of the State; when an officer in the State (*i. e.*, a county clerk) sim-

³ *Ibid.*, Sec. 15, Gen. Stat.; *Ibid.*, Sec. 14.

⁴ That is, by the oath of a stranger whose name is recited in the certificate. A far-fetched emergency.

See *Ibid.*, Sec. 19; Gen. Statutes, Sec. 18.

⁵ Rev. Stat., Secs. 17, 18; Gen. Stat., Secs. 16, 17. *Quære*: Does a Vice or Deputy Consul satisfy the statute?

ply certifies an acknowledgment of a woman as that of a married woman, it "shall be evidence that she has been examined separately, etc." This was construed by the Court of Appeals as meaning *prima facie* evidence only; though so strong as to require very plain proof to overturn it.⁶ What the examination shall be is best learned from the form prescribed for officers out of the State.⁷

"Commonwealth (or etc.), of — County (or etc.), of — *scd.*

"I, A. B. (here give his title), do certify that this instrument of writing from C. D. and wife, E. F. (or from E. F., wife of C. D.), was this day produced to me by the parties, and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed, and consented that the same might be recorded. Given under my hand and seal of office. [Seal.] A. B."

A date, though here omitted, is always added. Officers who take other acknowledgments may also certify those of married women.

The form has not been adhered to narrowly, but whenever it appears from the certificate that the officer did his duty in explaining the deed and examining the woman, and that she gave her consent, the certificate is binding. Thus an Ohio certificate was sustained, though only the "contents" instead of the "contents and effect" of the deed seem to have been

⁶ Woodhead v. Foulds, 7, Bush, 222, Foard v. Teal, *Ibid.* 156, are the only cases in which the evidence against the clerk's certificate was allowed to prevail. In these cases as well as in those following, in which the objection did not prevail, the contest was with the grantee himself, not with *bona fide* purchasers under him. The counter-evidence was deemed too weak in Hughes v. Coleman, 10 Bush, 246. In Mooreman v. Board, 11 Bush, 135, where the wife heard the deed explained in her husband's

presence, and then would not let the clerk explain it to her apart from him, it was held good, and in Jett v. Rogers, 12 Bush, 564, 567, the court says, if she understands the deed already there is no use in explaining it again. Under G. St., Ch. 81, Sec. 17, the certificate is conclusive, unless there be fraud in the grantee or mistake shown in the clerk; Tichenor v. Yankee, 11 Ky. L. R. 712.

⁷ Rev. Stat., Sec. 22; Gen. Statutes, Sec. 21.

explained, and the woman acknowledged that she “executed, signed, and sealed the deed,” instead of “executed and delivered.”⁷

The deed of a married woman can not be recorded after the proper time (eight, twelve, or eighteen months respectively), unless re-acknowledged by her; the proper time, then, counts from the re-acknowledgment,⁸ while the former law required a re-delivery, and counted time from that.

Provision is made that where the clerk vacates his office, leaving behind him instruments proved or acknowledged in whole or in part, and lodged for record, so appearing from official indorsements, his successor shall record them, making the certificate conform to the facts. A successor may correct the record copy when the original by which to correct is still in the office, and may in such a case also sign the omitted name of a deceased clerk to the same.⁹ The act of 1849 (Section 59, note 30) is also repeated, making any certificate theretofore taken by the proper officer of a privy examination *prima facie* evidence that the married woman acknowledged freely, etc.; yet if it is certified that she relinquished dower, the deed shall not pass the inheritance; and this is repeated in the General Statutes (*quære*, whether constitutional?). No deed is deemed as lodged for record until the State tax (fifty cents) is paid. An alphabetical cross-index must be made and kept by each county clerk.¹⁰

The two striking changes are, that county clerks are to leave out the details of the privy examination in their certificates; that a married woman's deed is again avoided, as before 1831, if not left for record within eight (twelve or eighteen) months.

⁷ *Martin v. Davidson's heirs*, 3 Bush, 543, relying on similar cases under the older recording laws; *Nantz v. Bailey*, 3 Dana, 111; *Gregory v. Ford*, 5 B. M. 471; *Gill v. Fauntleroy's heirs*, 8 B. M. 177.

⁸ Rev. Stat., Ch. 24, Sec. 23; Gen. Stat., Sec. 22.

⁹ Rev. Stat., Secs. 25, 26, amended

by act of January, 1864 (Myers' Suppl., p. 112), by inserting “or shall be produced to his successor for record,” so as to embrace deeds not in the office, and thus re-enacted in Gen. Stat., Secs. 24, 25.

¹⁰ Rev. Stat., Secs. 81, 82, 84; Gen. Stat., Secs. 80, 81, 83.

The Revised Statutes also lay down a separate law for the recording of "mortgages and deeds of trust;" of this, and of liens and powers of attorney hereafter.

Next follows an amendment of March 9, 1854, intended to give relief, where a deputy had indorsed a memorandum of acknowledgment, but had failed to write out and sign the certificate, the clerk himself was authorized to write out and sign the certificate, embodying such facts therein.¹¹ Next an amendment of March 10, 1856, that no paper not in the English language shall be recordable in "deed books and mortgage books;"¹² which was modified in 1862 (February 25th)—retrospective as well as prospective—allowing deeds and powers of attorney in foreign languages to be recorded, if accompanied by an English translation to be recorded with them.¹³ (Amended 1864, see note 9.)

The General Statutes taking effect December 1, 1873, contain a chapter (24) on conveyances, which is almost literally copied from the corresponding chapter in the Revised Statutes, as far as that goes. But it introduces some noteworthy changes:

1. The time for lodging deeds for record, as notice to purchasers, etc., is reduced, for those made by residents of Kentucky, to sixty days; by those residing in the United States, but out of Kentucky, to four months; "out of the United States" (the word "residing" is not used), twelve months.¹⁴

2. Deeds of married women as well as other deeds, if recorded after these periods, are good for every purpose from the time they are lodged for record.¹⁵

The act of 1854, made Section 38 in the chapter of the General Statutes on conveyances, gave much trouble. In writing

¹¹ Sess. Acts, 1854, re-enacted in Gen. Stat. as Sec. 38.

¹² Stan. Rev. Stat., I, 286.

¹³ Myers' Suppl. 112, re-enacted in Gen. Stat. as Sec. 37.

¹⁴ Gen. Stat., Ch. 24, Sec. 14.

¹⁵ *Ibid.*, Sec. 22, copied from Rev. Stat., only leaving out that part of the old section which excluded deeds by married women from its oper-

ation. As far as the Gen. Stat. seem to make the rule retrospective, they run counter to *Pearce v. Patton's* heirs (see *supra*, Sec. 9); and it was held in *Lee v. James*, 81 Ky. 448, that the new rule would not give effect to a release of dower executed in 1862 and not recorded till after the death of the husband.

out the certificate of a married woman's acknowledgment from the deputy's indorsement, the head clerk failed to copy that indorsement into the certificate, or even to notice it, but stated that the acknowledgment was made before the deputy. The recording upon the certificate was held unauthorized, and the title did not pass.¹⁶ And still worse, where the deputy indorsed and signed a memorandum, and the clerk then wrote a new certificate showing that the deed was produced and recorded, and the latter only was recorded, the deed was ineffectual, as the acknowledgment did not appear of record at all. The indorsement being only matter *en pais*, could not be used to complete the record.¹⁷ In one case the deputy's indorsement was in this form, "1875, September 22. Acknowledged by W. L. Gordon and Cordelia A. Gordon, his wife, to be their act and deed, as the law directs. C. W. Crabtree, Clerk, by Ernest Speed, D. C." The court held this to be in itself a good certificate, and, being copied into the record, it made it complete. And the clerk's reference to it as "my foregoing, by Ernest Speed, my deputy clerk," was deemed a fair compliance with the act of 1854.¹⁸ That act was also liberally construed in allowing the full certificate to be written out, not only by the principal clerk, but also by another deputy.¹⁹

To avoid further difficulties an act was passed on the 10th of May, 1884 (in force from its passage), dispensing with the former direction, that the deputy's memorandum be copied into the certificate when the acknowledgment is said to have been taken by him, and giving a form of certificate to be followed in substance for such cases.²⁰ The act is made retrospective, but is probably unconstitutional to that extent.²¹

But where the certificate was never signed at all by either clerk or deputy (as appeared from the original deed), the re-

¹⁶ *Franklin v. Becker*, 11 Bush, 595; said to be mistakenly decided in *Woods v. James*, *infra*, n. 18, because the memorandum of the deputy was really a good certificate in itself.

¹⁷ *McCormack v. Bush*, 14 Bush, 78.

¹⁸ *Gordon v. Leech*, 81 Ky. 229. The same facts arising under the re-

enactment in Gen. Stat. are found in *Woods v. James*, 87 Ky. 509, and same decision (1880).

¹⁹ *Drye v. Cook*, 14 Bush, 459.

²⁰ Bul. and Fel. Gen. Stat., p. 323.

²¹ *Pearce's heirs v. Patton's heirs*, 7 B. M. 162.

ording was unauthorized and the married woman's title did not pass.²²

Following the English decisions under the registry-of-assurance acts, it was held, that a purchase from the heir can not override the unrecorded deed of the ancestor;²³ for remedy an act of February 10, 1858, was passed, putting purchasers from or creditors of the heir or devisee on the same footing with those from or of the ancestor.²⁴

NOTE.—For effect of unrecorded deeds, see *infra*, in chapter on Defective Titles.

SEC. 62. POWERS OF ATTORNEY. The recording laws from 1792 down to 1873 often refer specially to powers of attorney. One principle, established judicially under one of the older laws, and expressly embodied in the later statutes, is this: that a deed made in pursuance of a power of attorney can not be lawfully recorded unless the power of attorney itself is recorded upon a lawful certificate,¹ otherwise the deed of a married woman is void, and the recording of any other deed would not be notice to purchasers and creditors. But, as held in the case first quoted, the record of the deed made by the attorney may be read for one purpose, namely, to prove its own execution by the attorney.

The Virginia acts of 1748 and 1785 (see Section 59) say nothing of powers or letters of attorney. They are first named in the Kentucky act of December 20, 1792.² The power is supposed to be given by some one residing in a county other than that of the attorney; if residing within the State, the principal is to acknowledge it in his own County Court; it is recorded there, and a certified copy from the record, showing the facts of acknowledgment and recording being produced to the clerk of the attorney's county "where the business is to be done," shall be recorded by him; if the prin-

²² *Jefferson B. and L. Association v. Heil*, 81 Ky. 515.

²³ *Harlan's heirs v. Seaton*, 18 B. M. 312 (1857), and cases there quoted.

²⁴ *Stan. Rev. Stat.*, I, 286, embodied in *Gen. Stat.*, Ch. 24, Sec. 8.

¹ *Voorhies v. Gore*, 3 B. M. 529, treats the principle as well established; *Taylor v. McDonald's heirs*, 2 Bibb, 420, establishes it.

² *M. and B. Stat.*, I, 434; *Litt. Laws Ky.*, I, 152; see Sec. 59, n. 10.

cipal reside in another State the same course is pursued, but the State or county seal must be annexed to the copy, and such copy shall be recorded in some "superior or inferior" court (by act of 1796 "in some court") of this State. The act of 1795 allows powers of attorney, as well as deeds and "other writings," to be recorded with the Clerk of the Court of Appeals, and by reference to this act the authority is afterward given to county clerks.³

The act of 1796⁴ re-enacts these directions almost literally. Thus far there was no law allowing *femes covert* to convey their lands or to bar dower through an attorney.⁵ They were first enabled to do so by act of February 1, 1812 (in force from its passage);⁶ but only a "non-resident *feme covert* of full age, residing in any of the United States of America or any of the territories thereof," might constitute an attorney. All subsequent statutes have confined the capacity to make an attorney to non-resident *femes covert*, and the tendency has been to construe these laws literally; that is, not to consider the woman's presence before a foreign officer, while acknowledging the power, as conclusive of her non-residence. But this question has never been brought up in any reported case.

The appointment must be made by deed, "subscribed, sealed, and acknowledged" by husband and wife before two justices in the county where they reside; the usual privy examination must be had, to which the words "and wishes not to retract it" are here added. The justices are then to make out the certificate, and the clerk of the county is to certify their official character under the county seal. These powers of attorney, with their attestations, are to be recorded in the clerk's office of the Court of Appeals. The act covers deeds of inheritance as well as releases of dower.

By act of January 23, 1818,⁷ the clerks of the Court of

³ Moore v. Farrow, 3 Mar. 44. A foreign mayor, under acts of 1785 and 1792, can not certify a power of attorney; Coleman v. Casey, 4 Bibb, 516; Bowman v. Bartlet, 3 A. K. Mar. 91.

⁴ M. and B. 437; Litt. Laws Ky.,

I, 567; see Sec. 59, n. 13.

⁵ Stansberry's heirs v. Pope, 2 A. K. Mar. 436.

⁶ Steele v. Lewis, 1 Mon. 48.

⁷ M. and B. Stat., II, 1330; Litt. Laws Ky., IV, 363.

Appeals, General Court, and County Courts are authorized to take the acknowledgment or proof of powers of attorney, and to record them like ordinary deeds (meaning such as they have themselves certified); also to record all powers of attorney executed abroad, "provided they shall have been authenticated" in the manner in which conveyances are under existing laws.⁸ This seems thenceforth to authorize such instruments to be certified by the same officers outside of Kentucky as were then allowed to certify deeds. The words "shall have been," it has been intimated by the Court of Appeals,⁹ were meant retrospectively, so as to admit to record powers of attorney acknowledged and certified before 1818, in the manner prescribed for deeds of conveyance.

The act of January 15, 1831,¹⁰ by its eighth section, puts powers of attorney, acknowledged or proved like deeds, on the same footing as those proved in open court under existing laws: this section seems to be meant for such instruments when acknowledged within the State by others than married women. But the third section provides for powers to be acknowledged by husband and wife "residing out of this State," alike to convey the inheritance or bar dower, before any "judge or mayor of a city." He must certify that he has taken the acknowledgment of the husband, and "hath privily and apart from her husband examined the wife, and that she declared on such privy examination that she did freely and voluntarily, and without the threats or coercion of her husband, acknowledge the same, and desired that her acknowledgment and privy examination should be certified to the proper officer to record it in this State."

Next came the Revised Statutes, Chapter 24, Section 14 of which prescribes for acknowledging, proving, and recording powers of attorney the same rules as for deeds of conveyance, and so it stands in the General Statutes. But there is no clause in the former authorizing married women to give powers of attorney; and not only could they no longer give such powers after the Revised Statutes went into

⁸ M. and B. Stat., II, 1331; Sess. Acts, 1818, p. 373.

⁹ Harris v. Price, 14 B. M. 515.

¹⁰ M. and B. Stat., I, 453, 457.

effect, but the better opinion is, that such powers as were already given could not thereafter be executed. The oversight was remedied by an act of February 23, 1856,¹¹ which allows married women not residing in the State "to convey under a power of attorney," to be made and acknowledged in the same manner as deeds of conveyance by married women. The language of the act of 1856 and of Section 36 of the General Statutes, embodying it, which restricts this capacity to convey by attorney to non-resident married women, is too plain to be construed away.

NOTE.—The principle *Potestas delegata non potest delegari*, as laid down in *Ruger v. Duff*, 4 J. C. R. 368, with the distinction between a naked power and an estate conferred on executors or trustees, so that the former can not convey by attorney, the latter can, is recognized in *May's heirs v. Frazee*, 4 Litt. 392, 400.

SEC. 63. CONVEYANCE UNDER OTHER POWERS. In a case coming before the Court of Appeals in 1865, it was said that the execution of express powers by trustees stands in Kentucky upon the same ground as elsewhere, except where they are abridged by statute.¹ In fact, it will be hard to find a divergence from the general American law in the decisions passing upon the execution of power, either of those of trustees or of powers granted with estates less than the fee-simple; and there is no case in which the court avows its divergence from the rules followed in other States, except where the statutes lay down their own rules.

These statutes abridge two classes of powers: *first*, powers of sale given to or for the benefit of mortgagees; *next*, the powers of sale or encumbrance given in connection with a separate estate in a married woman, either to her or to her trustee. The line of statutes on the former subject begins in 1820, on the latter in 1852.

There are other statutes conferring by construction powers not granted by the testator or donor: *first*, to an administrator with the will annexed, to sell and convey in like manner as

¹¹ Stan. R. Stat., I, p. 285, embodied in the Gen. Stat., Ch. 24, Sec. 36.

¹ *O'Bannon v. Musselman*, 2 Duvall, 279.

the executor might ; *next*, allowing a surviving trustee to carry out the power conferred on several.

1. Before 1820, it was usual to borrow money on land by giving to the lender what was called a "deed of trust," which meant simply a mortgage, with a power of sale, generally conferred on a third person. An act of that year,² being a part of the relief legislation of those days,³ directs "that no sale hereafter made by any trustee . . . under . . . any deed of trust or pledge of any estate whatever, shall be good . . . nor shall any conveyance made by any trustee . . . pass the title . . . of any estate . . . in any such deed mentioned, unless such sale shall be previously ordered . . . by a court of chancery, . . . unless the maker . . . shall join in the deed," etc. The Revised Statutes re-enact the law in more concise words, inserting "for the payment of debts" after "deed of trust;" the General Statutes put "real estate" for "any estate." The old act was intended to revoke powers already given at its date. Its immediate effect was, that such powers were no longer inserted in mortgages or in deeds of trust intended to operate as such. Efforts were made to invalidate under this law the sale of lands by assignees under trust deeds made for the benefit of creditors. No attempt was ever made to question sales made under powers contained in family settlements, or for the separate use of married women, the statute being too clearly intended as a shield against creditors. It was enacted for the benefit of the grantor ; hence, where he is not interested in the surplus or deficiency, after or before accomplishing the trust, his assent to the sale is not required ; for instance, if the creditors agree to take the proceeds, whatever they may be, in full of their demands.⁴

Where the grantor has exacted from the trustee (as is often done in insolvent assignments) a covenant to sell, the law does not apply.⁵ In a later case involving a very valuable lot,

² Act of February 11, 1820. Sec. 2, Mor. and Br. Stat., I. p. 449 ; Sess. Acts, p. 939, re-enacted in Rev. Stat., Chap. 80, Sec. 24, and in Gen. Stat., Chap. 63, Sec. 22, with such changes as are indicated in the text.

³ Butler v. Miller, 15 B. M. 620 ; argument of M. C. Johnson for app't.

⁴ *Ibid.* 626. It is not expressly so stated, but there seemed to be such an agreement as is indicated in the text.

⁵ Ogden v. Grant, 6 Dana, 476.

there was no covenant of the assignees to sell, but the residuum, if any, that should arise after payment of creditors was settled on the grantor for life, remainder to wife and children; the grantor being dead, it was held that his heirs could not, by reason of his failure to join in the assignees' deed, reclaim the lands sold by them.⁶ And a power of attorney given by an indebted owner of land to an attorney, who is not a creditor, to sell and convey the lands and apply the proceeds to the payment of debts, is not a deed of trust, as it creates no estate, but only a naked power, and is not within the statute.⁷ Still, as long as the statute retains its present form it hampers the free disposition of lands by assignees in insolvency.

2. Before the Revised Statutes all express powers given in connection with separate estates of married women, whether to the woman herself or to her trustee, and whether of sale or encumbrance, might be executed, as far as they did not run counter to some known rule. As to the powers implied from the mere use of the words creating the separate estate, the court inclined upon reasoning toward the views of Chancellor Kent,⁸ but upon authority to that of the Court of Errors, the latter holding that as to separate estate the married woman should in equity be considered as a *feme sole* generally, while the former would allow her no more than the powers expressly granted. The court found that the estate before them, though equitable, was not separate, and that the deed of husband and wife, for want of record within the statutory time, was void as against her; if her estate had been separate her unrecorded deed would have entitled the grantee to a conveyance of the legal title from the trustee.

The question how far the woman could "charge" her separate estate,⁹ is now quite obsolete; whatever it was, such power

⁶ Prather v. McDowell, 8 Bush, 46.

⁷ Reed v. Welsh, 11 Bush, 450.

⁸ Whitaker v. Blair, 3 J. J. Mar. 236, referring to Jacques v. M. E. Church, 3 Johns. Ch'y R. 77, reversed in 17 Johns. 548, by the Court of

Errors.

⁹ Coleman v. Woolley's executor, 10 B. M. 320, carried the power as far as the English leading case of Hulme v. Tennant. (White and Tudor's L. C. E.)

ceased in 1852 with the Revised Statutes. . It was then enacted:¹⁰

“If real or personal estate be hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, *she* shall not alienate the estate with or without the consent of any husband she may have, but may do so when it is a gift, by the consent of the donor or his personal representative. . . . Such estates heretofore created shall not be sold or encumbered; but by order of a court of equity, and only for the purpose of exchange or reinvestment, etc.”

The latter, retrospective clause, is more trenchant than the first, which works on trust estates raised thereafter, and which strikes only at powers of sale or encumbrance, granted either implicitly or expressly to the married woman herself, not to those conferred on her trustee; certainly not when her trustee is not her husband. To clear all doubts, an act of February 16, 1858,¹¹ directed that this section be not so construed as to forbid alienation of separate estates by trustees under *express* powers; but the act adds, “whether such estates were created before or since the adoption of the Revised Statutes.” Meanwhile, on the 3d of March, 1856,¹² another act had already helped out such estates antedating the revisions of 1852; thus “Section 17, Article IV, Chapter 47,” is not to apply when “powers of sale or exchange are expressly given.”

While the harsh rule of the Revised Statutes stood, attempts to break it were often made. Two points only were gained: *First*, where an estate had become separate, not by being thus devised or conveyed to the *feme*, but by her and her husband’s ante-nuptial agreement, it was held not to be within the first or prospective clause, and her power under the old law remained unabridged.¹³ *Second*, where the husband

¹⁰ R. St., Ch. 47, Art. IV, Sec. 17.

¹¹ Stanton’s R. S., II, 87. In *O’Ban-non v. Musselman*, *supra*, it is said that powers to trustees were not affected by the first clause of Sec. 17 as it stood originally, and thus held out-right in *Lewis v. Harris*, 4 Metc. 356.

¹² Stan. Rev. Stat., II, 87.

¹³ *Stites v. Bryan*, MS. Op. 1858. See *Hanley v. Downing*, 4 Metc. 97; there this exception was not extended to a separate estate raised by husband and wife out of the proceeds of her general estate sold by them.

with his funds buys land for his wife's separate use, he is the donor within the meaning of the proviso to that clause ; hence his and her joint deed make a good title.¹⁴

What words, technical or otherwise, will raise a separate as distinguished from a general estate, has, with one exception, been ruled in accordance with the current of English and American law.¹⁵

The corresponding section of the General Statutes¹⁶ again changes the law radically. "Separate estates and trust estates"¹⁷ devised to married women may be sold and conveyed in the same manner as if such estates had been conveyed or devised absolutely, if there be nothing in the deed or will under which they are held forbidding the same, and if the *trustee and husband* unite with the wife in the conveyance, but her interest shall be the same in the proceeds as it was in the estate."

The words in italics were by an act of April 27, 1880,¹⁸ changed so as to read "husband and trustee, if there be one."

It will be noticed that though the disposition of a separate or trust estate may, under this law, be hampered by the deed or will raising such estate, it can not be helped by it. A power given in the deed or will to the married woman, to act with the estate as if she were a *feme sole*, will not be recognized, and there is no reason under this statute to allow even the trustee to wield an express power of sale given to him, otherwise than by joining in the deed of husband and wife. And though the trust be naked, not active, it seems that as long as there is a trustee he must "unite with the wife in the conveyance," and that without his uniting with her it would be void, and would probably not carry even the equitable title. In case of his refusal without reason, the husband and wife would have no remedy but to have him removed and another trustee substituted by a court of equity.

¹⁴ Dent v. Breckinridge, 1 Duv. 245.

¹⁵ Johnson v. Ferguson, 2 Metc. 503; Gains v. Poor, 3 Metc. 503. The one exception is Harris v. Harbeson, 9 Bush, 402. See further Sec. 64. The estate can not be "separate," but must be absolute, while the *feme* is

sole; Duke v. Duke, 81 Ky. 812.

¹⁶ Chapter 52, Art. IV, Sec. 17.

¹⁷ This seems to turn every trust for a married woman, and certainly every active trust, into a separate estate for all restrictive purposes.

¹⁸ Bul. and Fel. ed. Gen. Stat. p. 748.

Under the clause of this statute which raises the same trust in the proceeds as in the land sold, the purchaser would not have to follow the application of his purchase money; but where the nature of the purchase is such that the proceeds can not be enjoyed by the wife in accordance with the trust: for instance, if the debt of the husband be the consideration of the sale, or of an encumbrance, there would be a fraud upon the purpose of the act, and the conveyance would be void, at least to the extent of the diversion of the proceeds.¹⁹

SEC. 64. DEVISES. Before coming to the statutory enlargement of testamentary powers, we must state the effect of a will on land under the Kentucky law from its beginnings.

Before 1787 the power of devising lands depended on the English statute of wills (as amended by an act of Virginia of 1748, requiring signature and attestation); the will was in the nature of a conveyance, carrying only the title to such lands as the devisor owned at the time of publication. But the faintest equity or claim, not only *in* but *to* the land, held at the date of the will, was sufficient to transfer to the devisee (if such intention appeared) the lands subsequently acquired by reason of such claim or equity.¹

The Virginia act of 1785 (in force January 1, 1787) was re-enacted in Kentucky, February 24, 1797.² Under it any person of full age (21), not a married woman, being of sound mind, may devise any estate he has at the time of his death.³ The will must "be signed by the testator or by some other person in his presence and by his direction, and moreover," if not holographic,^{3a} "be attested by *two* or more competent witnesses, subscribing their names in his presence;" saving,

¹⁹ *Hirschman v. Brashear*, 79 Ky. 248. This is in accordance with the principle laid down by the S. C. U. S. in *Wormley v. Wormley*, 8 Wheat. 421.

¹ *Gist's heirs v. Robinett*, 3 Bibb, 2.

² *Litt. Laws Ky.*, I, 611, and *Mor. and Br. Stat.*, II, 1537.

³ Under this law, the burden of showing the intention of including after-acquired lands was on those

claiming under the will; see *Warner's ex'r v. Swearingen*, 6 Dana, 195, 199, following a Virginia precedent; also *Dennis v. Warder*, 3 B. M. 174; under the Rev. and Gen. Stat. the presumption is in favor of such inclusion; see *Rev. Stat.*, Ch. 106, Sec. 17; *Gen. Stat.* Ch. 113, Sec. 16.

^{3a} Where a will is wholly written by the testator, it does not cease to be holographic, by pencil memoranda

however, to the widow her dower. Where the testator has no child at date of will, and a child (posthumous or other) is born afterward, the will is void during its lifetime, and only goes into force if the child die unmarried *and*⁴ under age. If the testator has a child or children, but pretermits without disinheriting them, the will is void as to their shares, which the devisees and legatees must make up in proportion. A bequest (or devise) to a subscribing witness is void, if the will can not be proved otherwise, reserving to such witness his share, if any, of the estate. The power of probating wills is conferred on the County Court, as in Virginia, and it was always held⁵ that in contests over land as well as over chattels the probate might be read as establishing the will, and such had been the law in Virginia. The widow could within a year of the testator's death renounce the benefit of the will, taking her dower and distributive share. The act provided for the probate of foreign wills, but this provision was superseded by an act of December 23, 1820, which provides for the recording (without proof in this State) of foreign wills, "whenever any land or other estate in this Commonwealth has been devised," in the office of the Clerk of the Court of Appeals. A certificate by the clerk or judge of the foreign probate court, under its seal, is demanded before recording—not, however, the formality of the act of Congress on the authentication of sister State records. Until set aside, a will so recorded shall have the same force as if proved here under our laws; but an opportunity is given to contest such foreign

made by his attorney, upon the testator's request that he suggest the proper changes, nor by subjoining an attestation clause for witnesses below the testator's signature. (*Toebbe v. Williams*, 80 Ky. 661.)

⁴ The word in the statute is "or;" it should be construed "and," and is corrected into it in Rev. and Gen. Stat.; see Ch. 106, Sec. 24 of former, Ch. 113, Sec. 23, of latter.

⁵ *Bowman v. Bartlett*, 3 Mar. 86,

90. A Virginia will was read on the probate of the General Court of that State. Our court took judicial notice of the powers of that court as they stood before the separation, but said that proof might also be made of the will as an unrecorded conveyance under the English rule. This would certainly not be allowed now as to a home will, and probably not as to a foreign will.

will by suit in the Circuit Court, as to its bearing on lands in this State.⁶

An act of January 17, 1839,⁷ changes the common law rule that devises and legacies lapse, when the objects of the testator's bounty die before him, in favor of his children and grandchildren, so that their issue living at the time of the testator's death may take.

Chapter 106 of the Revised Statutes, "Wills," does not affect wills published before, though the testator died after they went into effect.^{7a} It declares the old rule that infants and married women may devise under a special power, and the latter may devise a separate estate. (Sections 2 and 3.) Here it becomes material what words will raise such an estate, and a case decided in 1866⁸ must be noted, passing on a marriage settlement, under which an estate was to be held by the wife free "from any charge or debt" of the husband, and the wife was to have power to sell, manage, and exchange; and yet it was held not to raise a separate estate, and the will made in pursuance of the deed was rejected, thus recognizing an anomalous estate, neither general nor separate. In the clause as to witnesses the word "competent" is changed into "credible," but both words mean the same, and the whole clause only re-enacts the old law. If the witnesses can not write, it is a good "subscription" if another puts down their names at their request, in their and the testator's presence.^{8a} The witnesses may subscribe on the testator's acknowledgment, though

⁶ M. and B. Stat., II, 1548. The superseded section is omitted in the act of 1797 in M. and B. Stat., but is given in Litt. Laws Ky., I, pp. 611, 614.

⁷ Loughb. Stat., p. 400; Sess. Acts, 1820, p. 38.

^{7a} Broadwell v. Broadwell's adm'x, 4 Met. 290, where, under a deed made in 1848 of a testator dying in 1861, the after-acquired lands did not pass by the will, not being named, and were not subjected to debts in case of the personalty.

⁸ Harris v. Harbeson, 9 Bush, 400. But in Hiram v. Griffin, 8 Bush, 262, the property allotted to the wife in articles of *separation* between her and her husband (no trustee) was held to be separate estate, subject to her will, though no express words appear to make it such.

^{8a} Upchurch v. Upchurch, 16 B.M. 112.

⁹ Cochran's Will case, 3 Bibb, 491. A request to the witness to attest and subscribe is an implied acknowledgment (Tudor v. Tudor, 17 B. M. 883),

they have not seen him sign,⁹ and he may show them only his signature without telling them that the paper is a will.¹⁰ The will of an illiterate may be valid though it is not read to him.¹¹ The object in having the witnesses subscribe the will is to identify it, hence the testator may sign after them if the witnesses stayed with him and "attested" (*i. e.*, saw) him sign.¹² While the act of 1797 bids the testator "sign" the will, under the Revised Statutes he must "subscribe" it; that is, put his name at its end. Under the old law he might adopt his name, put by the draftsman at the head of the will as his signature, and if it appeared plainly that he considered the will complete it was well published.¹³ This case was once, perhaps, inconsiderately quoted in an opinion (n. 8) dealing with the new law, with the remark that the Revised Statutes do not change the formal requisites of a will. However, in a later case the difference between "to sign" and "to subscribe" was dwelt on, and a signature at the bottom is now indispensable.¹⁴ A will that is lost, either before or after the testator's death, may be established if it can be shown by proof that it had once been published with all the lawful formalities, and has not been destroyed by the testator.¹⁵ How to prove the signatures of

and one witness in the presence of the testator asking another witness to attest, he consenting by silence, is an acknowledgment. (*Denton v. Franklin*, 9 B. M. 28, with which *Griffith v. Griffith*, 5 B. M. 511, is not in conflict; see also *Orndorf v. Hummer*, 12 B. M. 619.) The Kentucky law as to "presence" and "attesting" is in the main in accordance with the general law.

¹⁰ *Flood v. Pragoff*, 79 Ky. 607, 610. Nothing should be added to the forms required by statute, least of all any thing depending on memory. The witnesses need not subscribe in each other's presence, these words of the English being omitted in the Kentucky statute.

¹¹ *Christopher v. Shanks*, 3 A. K. Mar. 144.

¹² *Swift v. Wiley*, 1 B. M. 114. "Attesting" is a mental act; the witnesses either seeing the testator subscribe, or hearing him acknowledge. But if the testator completed the will at a later time, in the absence of the witnesses, *secus*. (*Chisholm v. Bent*, 7 B. M. 411.)

¹³ *Soward v. Soward*, 1 Duvall, 126, 130. A will folded up and signed by the witnesses on the back is not published as the law directs.

¹⁴ *Happy's Will*, 4 Bibb, 553, and seven other cases quoted in *Chisholm's heirs v. Ben*, 7 B. M. 408 (1847). The witnesses deposing as to contents of will must have read it with their own eyes. But they need only recollect the substance, not the very words. (*Allison v. Allison*, 7 Dana, 95.) Part may be established,

the testator and attesting witnesses is part of the Law of Evidence. A power to make an instrument in the nature of a will can not dispense with any of the statutory formalities, and, except as to married women, can not add any.¹⁴ On "sound mind, disposing memory, undue influence," the course of Kentucky decisions does not differ from the common English-American law.¹⁵ But a great advantage is given to the propounders by the rule of practice, which forbids the trial-judge from charging the jury otherwise than by written instructions, which must refer only to law, not to facts; he may not point out any circumstance in the proof as tending to invalidate the will; that evidence of any fact has been let in is instruction enough to the jury, that they may consider it.¹⁶

The statute seems to require that in the County Court, in the ordinary proving of the will, the witnesses should be asked as to the soundness of the testator's mind at the time of publication; but on a contest, where evidence is adduced on both sides, the court or the jury may draw their conclusions from all the evidence; and though some evidence on this head must be produced by the propounder, it is said that "the writing or dictating of a rational will" is *prima facie* proof.¹⁷

The will speaks as to lands as well as personalty, as of the moment before the testator's death (Section 17). The former statute against lapsing of devises (and legacies) is extended from children and grandchildren to all persons who may die

and such part only as witnesses collect from reading. (*Steele v. Price*, 5 B. M. 58.) It is left doubtful in this case whether the testator's acquiescence, after he learns that his will is destroyed, can amount to a revocation, it being held on the weight of evidence that there was no intent to revoke. It was said by the Court of Appeals, in 1856, that *no one* denies the power of a court of equity to establish a will in case of spoliation. (*Barnes v. Edward*, 17 B. M. 640.) *Perhaps* secondary and weaker evidence is admissible when spoliation

has been shown, *ubi supra* *Chisholm v. Ben.* But (as in England) the declarations of the testator as to existence or contents of a will are not admissible. (*Mercer v. Mackin*, 14 Bush, 434.)

¹⁴ Section 6 of Chapter on Wills.

¹⁵ The authorities are collected in B. and F. edition Gen. Stat., pp. 1275-1280.

¹⁶ *Stokes' ex'rs v. Shippen*, 13 Bush, 180, 183, and other cases.

¹⁷ *Hawkins v. Grimes*, 13 B. M. 257, 270.

before the testator, having issue (Section 18). A new provision is introduced by Section 19, in addition to the former law as to pretermitted children and grandchildren: "If the testator has a child or grandchild living at the time of his death, whom then, and at the time of making the will," he "believed to be dead; or if a child dies out of the State within" his "knowledge, leaving issue" unknown to him, "and no provision for the exclusion of such child, etc., is made by the will, the child, etc.," shall have his share as in case of intestacy; the presumption of mistake may be rebutted by parol or other proof.¹⁸ Marriage after the publication of a will (other than a will in execution of a power where, in default of such will, the estate would go to strangers to the donee of such power) also revokes the will. (Section 9 in both Revised and General Statutes.) Wills made and published before the Revised Statutes took effect would be governed by the previous law, though the testator died after such taking effect, unless republished thereafter, which is of importance mainly as to the changes in lapsed devises and pretermitted children.¹⁹

The statute takes away in favor of "one of the heirs of the testator" the common law presumption that to turn land into money, or money into land, is meant to adeem a devise of the thing so converted, allowing a contrary intent to be proved, not only from the will, but by parol or other evidence.²⁰

A will contingent on its face could formerly be admitted only if the condition was fulfilled.²¹ But a late case goes to the utmost verge the other way. The testator, having under date of January 14, 1859, written this will, "If any accident should happen to me that I die from home, my wife E. L. shall have every thing that I possess," died at home about twenty years afterward, yet the will was sustained. The former cases are not overruled, and the English cases on contingent wills are approved as good law, but the distinction is drawn that no

¹⁸ Re-enacted in Gen. Stat., Chap. 113, Secs. 18 and 19. Chapter 106.

²⁰ Gen. Stat., Chap. 50, Art. III.

¹⁹ *Cunningham v. Cunningham*, 18 B. M. 20, construing Section 26 of

²¹ *Massie v. Griffin*, 4 Metc. 364; *Daugherty v. Daugherty*, 4 Met. 25.

certain time is here set when the accident might happen, or when the testator might die from home.²³

When a devise turns out to be void, it does not fall into the residuary, but goes as in case of intestacy.²³

Each of the two revisions authorize the recording of foreign wills; no longer, as under the act of 1820, with the Clerk of the Court of Appeals, but in the clerk's office of the "proper court," which means that of any county in which there is estate. The court orders the will to record upon the strength of the foreign probate, and if the will is shown by such probate to have been executed with the formalities required by our law, it is good as to Kentucky lands, but at all events, if established at the domicile it is good for personalty here. But the foreign probate raises only a presumption "in the absence of evidence to the contrary," which means that the County Court order for recording a foreign will may be appealed from like any other order of probate, though it is doubtful whether the contest should or would affect any thing but the lands in Kentucky.²⁴

While neither the formal requisites of a will nor its effects have been changed by any law enacted since 1852, the General Statutes have greatly affected the proceedings, and, above all, the time when the sentence of probate or rejection becomes final. By Section 29 of the older Section 28 of the later revision, the probate in this State is the only admissible and the conclusive proof of a will—"except as to the jurisdiction of the court, until the same is suspended, reversed, or annulled." As it is very unusual to supersede the sentence of probate, it is important for one dealing with the title to know when and with what effect a recorded and apparently good will of lands may be reversed or annulled. Under Section 27 of the chapter on Wills in the General Statutes, the appeal to the

²³ Likefield v. Likefield, 82 Ky. 589.

²³ Section 20 in both revisions, applied in Jackson v. Collins, 16 B. M. 214, 221, to a devise made to a slave; it would probably have been decided in like manner without the statute.

²⁴ Sec. 31 in Rev. Stat., Sec. 30 in Gen. Stat.; Sneed v. Ewing, 5 J. J. Mar. 460, 476, where the court says, that to allow lands to follow finally the sentence of a foreign court is to abdicate our sovereignty.

Circuit Court can be taken within five years from the final judgment in the County Court. The Circuit Court tries the case *de novo*; from the judgment in the Circuit Court an appeal may be taken within one year to the Court of Appeals, which is heard there like appeals in other cases.²⁵ But a non-resident of the State, who was proceeded against in the Circuit Court by warning order only, and did not appear, and any person in interest who was not made a party in the Circuit Court may impeach the result there reached, by petition in equity within three years thereafter; an infant, not a party, may do so within one year after coming of age, "but (Section 38) no such proceeding in equity, etc., shall operate further than is necessary to the rights of such infant, non-resident, or other party, etc."

It seems to be admitted that whoever buys from the devisee (or heir) before the time for contest has run out is a *pendente lite* purchaser, and must take the risk of a will already established being set aside, or *vice versa*. The purchase from the executor under a power rests on other grounds, and the effect upon it of a subsequent annulment of the will is not determined.²⁶

A will, under both revisions, and under the Statute of Wills of 1797, must be proved in the County Court of the testator's residence, if he have a known residence in the State; if he has none, then in the county in which devised land lies; if there be none, then in the county where he dies, or that

²⁵ We have in Section 17 (see n. 7) discussed the bearing on will cases of the constitutional guarantee of trial by jury. While the denial of an ultimate trial by jury can not be rested on the old English practice in probate cases, as is done in *Wills v. Lochnane*, it may rest properly on the practice of Virginia as a colony and State before 1792, as there already the probate was made binding on the decedent's lands. But the clause of the Gen. Stat. (Ch. 113, Sec. 27) giving to the verdict of a jury in a will case the same effect as in other

cases was wholly disregarded, during the progress of this work through the press, in *Bush v. Lisle*, 11 Ky. L. R. 708, where the Court of Appeals, considering the verdict of the jury upon the will unsupported by the evidence, instead of awarding a *venire de novo*, made its own final decision upon the will.

²⁶ *Arterburn's ex'r v. Young*, 14 Bush, 509. The case went off on the ground that the appeal had been taken too late, and was therefore ineffectual as to third parties.

“wherein his estate or part thereof (the act of 1797 said, the greater part) shall be, or where there may be any debt or demand owing to him.”²⁷

SEC. 65. STATUTORY EXTENSION OF POWERS. By Section 44 of an act of 1797 (in force March 1st),¹ it is enacted: “The sale and conveyance of lands devised to be sold shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person be thereby appointed, etc.” This was held to apply only where the will positively orders a sale, and not where the testator empowers the executors to sell or exchange his real estate as they might judge necessary; “the sale being made to depend on the judgment of all, must be made by all, and unless all will qualify, can not be made at all.”² The statute does not help a naked power, not coupled with an estate or interest.³ Where the will is foreign, it must first be proved in Kentucky before our courts can say that any executor has taken upon himself the execution of the will.⁴ In 1830 the statute was construed somewhat more broadly than at first; under a devise, that the executors sell land for payment of debts, if the personal estate be insufficient, a deed from those executors (less than all) who had qualified was sustained, it being said that the contingency did not rest in their own choice.⁵

Thus the law stood until 1852, when Section 9 of Chapter

²⁷ Gen. Stat., Ch. 113, Sec. 26 (Sec. 27 in Rev. Stat.); M. and B., II, 1548.

¹ M. and B. Stat., I, 666; Litt. Laws Ky., I, 615.

² Wooldridge v. Watkins' ex'rs, 8 Bibb, 349, 351; so where a “discretionary power” is given in so many words. (Smith v. Moore's heirs, 6 Dana, 417.)

³ Halbert v. Grant, 4 Mon. 582; *contra* (there being an interest) Baird v. Rowan, 1 Mar. 214; Muldraw's heirs v. Fox's heirs, 2 Dana, 74; Ross v. Clore, 8 Dana, 189. The power, to be helped by the statute, must be given to the executors as such.

⁴ Carmichael v. Elmendorf, 4 Bibb, 484. Qualifying by the executors in the County Court which probated the will would now be demanded, and was probably in the mind of the court.

⁵ Coleman v. McKinney, 3 J. J. Mar. 246. It is said (p. 42) that even at common law lands devised to the executors to sell would vest only in such executors as would qualify. It was also said (p. 251), that the sale would pass the title though it turned out that there were enough personal assets; but compare Luke v. Marshall, *infra*, n. 12.

37 of the Revised Statutes worked a violent change. Under this section those executors who qualify and the "residue or survivor may sell the land which the will directs or devises to the executor or to another person to be sold, or gives a *discretionary* power to sell, if no other person be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it." This statute is so broad as to leave no room for construction, and so subversive of the testator's wishes that it could not have been applied to wills already published. Those who wish to preserve their estates from waste through the weakness or imprudence of a single executor will have to provide in their wills expressly that a discretionary power is to cease, unless all the executors named shall undertake the trust. The section is literally re-enacted in Section 9 of Chapter 39 of the General Statutes.

Even more arbitrary than this substitution of one for several executors, or of the executor for the trustee, is the statute giving to an administrator with the will annexed (a person not in the testator's mind at all) all the "powers, interests, rights, and authorities that by the will belong to the executors, etc."⁶ Of course, the administrator *c. t. a.* must have been appointed and qualified in Kentucky, and it must also appear⁷ that the refusal to qualify, or the death of the executors named in the will gave to the court jurisdiction to name an administrator. Here it is not required, as under the act of 1797, that the power should be coupled with an interest, though it is likely⁸ that while that act narrowly bounded the action of "less than all" the named executors, a personal discretion given to named executors in so many words would have been held to exclude an administrator put in their place by the County Court.

In the Revised and the General Statutes⁹ this law reads thus: "An administrator with the will annexed shall possess

⁶Act of December 22, 1810; M. & B. Stat., I, 67; Litt. Laws Ky., IV, 204.

⁷Jackson v. Jeffries, 1 A. K. Mar. 88.

⁸Brown v. Hobson, 8 A. K. Mar. 880; facts arising before act of 1810.

⁹Ch. 3, Art. I, Sec. 13, of the former; Ch. 39, Art. I, Sec. 13, of the latter.

and exercise all power and authority, and shall have the same rights and interests and be responsible in like manner as the executors therein named, or any of them." This has been construed (in a MS. O. quoted in one and followed in another reported case) to give to such administrator the discretionary powers conferred by the will on the executors.¹⁰

The old rule, that where a power of sale is given to raise specific sums, the purchaser must look to the application of the purchase money, was in 1852 abolished by statute,¹¹ and whether the purpose be general or specific, the purchaser gets a good title, unless the conveyance or devise expresses the contrary, and unless he has (an exception not in the statute) notice that the proceeds will not be so applied. The latter exception would flow from the ruling on the sale or encumbrance of separate estates.¹²

SEC. 66. TITLE BY ESTOPPEL. At common law, where a man conveys with warranty (general or special) land not his own, or a greater estate than he owns in the land, and he afterward acquires the land or an interest therein so conveyed, he is estopped from reclaiming what he has conveyed, and the grantee can hold on to the estate by estoppel.¹ The first section of an old statute, re-enacted in the Revised and in the General Statutes, seems to repeal this wholesome rule, but as the next section, which is also in substance put into the two revisions, formulates the old law of "warranty and assets," it could never be so construed as to allow the warrantor himself

¹⁰ Smith v. Haywood, Win. Term, 1869, quoted in Gully v. Prather's administrator, 7 Bush, 168. Enough of that opinion is printed in Shields v. Smith, 8 Bush, 604, to show that the Rev. Stat. have so modified the old law that the administrator *c. t. a.* may now exercise the discretion conferred on others. Considering the great looseness of County Courts in the choice of administrators, counsel engaged in drafting wills ought to provide against such a contingency.

¹¹ Rev. Stat., Ch. 106 (Wills), Sec. 28;

Gen. Stat., Ch. 118, Sec. 22; though, under the head of Wills, lands conveyed as well as devised in trust are included.

¹² See Sec. 63, n. 19; Hirschman v. Brashears, 79 Ky. 248; Luke v. Marshall, 5 J. J. Mar. 356 (bef. R. S.) where purchaser took part in the fraud on the power.

¹ Act of January 16, 1798, M. and B. Stat., I, 110; Litt. Laws Ky. II, p. 89; Revised Stat., Chap. 80, Secs. 17, 18; Gen. Stat., Chap. 80, Secs. 17, 18.

to reclaim lands which his heirs or devisees could not reclaim. Hence the old rule of estoppel by warranty was upheld under statutes almost literally like the present.² The second section of the old law re-affirms the old rule of "warranty and assets by descent," and prevents circuitry of action by barring the claimant to the amount of assets descended from the warrantor. In a suit brought by the heirs of the first wife, who had been barred by assets from the father and his warranty from recovering their mother's land, against their co-heirs from the father for contribution, the doctrine came up for discussion, and the court said that such a rule, barring the heirs of the mother from suing for her lands not properly conveyed by her, on account of the father's warranty and assets, was unknown in nearly all the States of the Union.³

The corresponding section in the Revised and General Statutes requires a "general warranty," while the old act speaks only of "warranty." And such must have been the rule before, for if A grants the lands of B, but warrants only against himself, there is no reason why B's heirs should lose the assets inherited from A, which they do in losing B's land.

But the modern statute broadens the rule very much in another direction, for now, if there "be a claimant of the land who has received any estate, real or personal, by gift, advancement, descent, devise, or distribution from the *vendor*, such claimant shall be barred of recovery the extent of the value of the estate so *devised*." (The other verbs are not here repeated but must be understood.) The law has been once applied in a reported case against a daughter, whose estate the mother had sold with warranty, and to whom she afterward devised other

² Beard v. Griggs, 1 J. J. Mar. 27; Berthelemy v. Johnson, 3 B. M. 93. Rule fully recognized in both cases, but not applied, on the facts, in either. The object of the statute saying that "alienations and warranties" shall operate only on such rights as the parties may lawfully convey, may

have been intended to cut off the common law rule as to collateral warranty, which was binding even without assets. The warranty of a married woman is void, and creates no estoppel. Her deed is good only as to its granting clauses.

³ Todd v. Todd, 18 B. M. 148, 165.

property. The Court of Appeals directed an inquiry into the net value of the devise.⁴

As only a person *sui juris* can bind himself by warranty, these old rules of estoppel thus formulated in new statutes are unexceptionable. Not so clear is a case⁵ in which the court has extended the doctrine of estoppel to a grantor—an infant married woman—who, under the law as it then stood, was incapable of granting away her land in any way: because she had induced the purchaser, by her affidavit that she was of age, to lay out his money on her lands. The statute then provided a means by which the lands of infants (including married women) might be sold for certain purposes, and “a sale by affidavit” ought not to be added to the other methods.

More equitable is a late decision (1888) by which a married woman, on recovering back from the purchaser land from which she had parted by a voidable deed and defective proceedings, was put on terms: to restore the proceeds which had been invested for her, and paying for the improvements.⁶

In a State where the doctrine of estoppel is thus extended, it is, of course, applied with the fullest force to all persons capable of making a grant, and many a married woman has found herself releasing her dower through “standing by” while her husband’s estate was publicly sold as being free of dower.⁷ And so of lien-holders remaining silent when they see the estate being mortgaged.⁸ Thus an executor, who had paid for a house, was estopped from contesting the devise of half of it to his wife by acting for a long time under the will,⁹ and generally speaking the doctrine of estoppel *in pais* has been carried as far as anywhere.

⁴ Proctor v. Smith, 8 Bush, 81.

⁵ Schmitzheimer v. Eisenman, 7 Bush, 298. The court remarks that there is no evidence of the infant wife making the false statement under coercion; but as she could not then testify in her own behalf, and her husband was dead, such evidence was out of the reach of possibility. The requirement of the affidavit

showed that the purchaser had good reason to believe the grantor an infant.

⁶ McDanell v. Landrum, 87 Ky. 404.

⁷ Connolly v. Branstler, 3 Bush, 702. A short case in which the result is treated as a matter of course.

⁸ N. & C. Bridge Co. v. Douglass, 12 Bush, 673.

⁹ Boyd v. Gault, 3 Bush, 644.

The distinction taken on an ejectment case in 1842, that the maxims *Qui tacet consentire videtur*, and *qui potest et debet vetare, jubet*, are recognized in equity only, but not in law (rejecting Lord Mansfield's unsupported precedent to the contrary¹⁰), is, under the present practice, allowing equitable defenses in actions at law, of but little importance.

SEC. 67. CHAMPERTOUS CONVEYANCE. The rule forbidding the transfer of land in adverse possession was recognized by a Virginia act of 1786, repealed as to interests in Virginia claims by a Kentucky act of 1798, but re-enacted with additional sanctions in 1824, and on this act the provisions of the Revised and of the General Statutes on champerty are mainly based.¹ As conveyances, made before 1852, of land then held adversely, can hardly come into question at this day, the old statutes and the construction of their features that are not now in force need not be discussed. Whether the rule which makes a champertous conveyance void is part of the common law, or only a creature of statute, is left doubtful by the Kentucky authorities.²

The Revised Statutes (Chapter 12) and General Statutes (Chapter 11) annul all conveyances of land in adverse possession, including those made under execution, a release to the party in possession being an implied exception. The words "at the time of such sale, *contract*, etc." indicate that an executory sale is also void, and let in the construction given to the old law, that a deed made during an adverse holding in pursuance of a contract, even a verbal one, made before it commenced, is allowable and good.³ A deed of gift falls within

¹⁰ *Dennis v. Warder*, 8 B. M. 178, 175. A party who had bought with the acquiescence of the legal owner, which raised an equitable estoppel, was in this case treated as his tenant at will; and thus his action in ejectment was defeated for want of previous notice to quit.

¹ M. and B., I, 234; Litt. Laws Ky. II, 569; M. and B., I, 234; Litt. L. Ky. 230; M. and B., I, 235; Session Acts, 1824, 443.

² The older cases ascribe the rule to the common law; *Preston v. Breckinridge*, 86 Ky. 619, 632, calls it statutory.

³ *Green v. Wintersmith*, 85 Ky. 517, 523 (1887), and cases there quoted. Aside of the chapter on Champerty and Maintenance, the General Statutes, in Section 1 of the Chapter on Conveyances, say: "The owner may convey any interest in land not in the adverse possession of another."

the law as much as a sale;⁴ a mortgage as much as an absolute deed.⁵ The widow can not sell her dower against the assignee of the husband who does not recognize it.⁶ But the devise of land held adversely is allowed, and a judgment-creditor of the claimant can reach it by suit in equity, making the occupant a party.

The law is not to apply to controversies of "lessor and lessee, vendor and vendee, mortgagor and mortgagee, trustee and *cestui que trust*," a clause which keeps alive the law ruled under the old acts, that "there is no champerty as against an occupant who is bound to surrender the possession without questioning the title."⁷ A vendor who has not yet delivered possession can not object to his vendee selling and the second vendee bringing suit; and a vendee by executory contract can not assume the position of adverse holder against his vendor who still has the legal title.⁸

Land may be in adverse possession without being inclosed, as there are many other ways of taking actual possession of land beside inclosing it.⁹

After judgment in ejectment, but before possession is delivered, the successful litigant may sell, for his title is no longer "pretended":¹⁰ and where the sheriff by mistake, under a judgment and writ for one moiety, delivered to the plaintiff an exclusive possession, a deed from the dispossessed defendants was held good, and the court tried to lay down a dis-

⁴ Clay v. Wyatt, 6 J. J. Mar. 584.

⁵ Redman v. Reid, 2 Dana, 69.

⁶ Kinsolving v. Pierce, 18 B. M. 782.

⁷ Castleman v. Combs, 7 Mon. 276; Baley v. Drakins, 5 B. M. 159, 161. The distinctions in this and kindred cases are thin.

⁸ Craig v. Austin, 1 Dana, 518; Griffin v. Dicken, 4 Dana, 563. The distinction between "adversary" and other conflicting titles, intimated in Christopher v. Gregory, 4 B. Mon. 480—claimants under the husband's deed of the wife's land—is hard to

grasp. It was always understood that the adverse possession need not be under another patent. (Lillard v. McGee, 3 J. J. Mar. 551.)

⁹ Moss v. Scott, 2 Dana, 271.

¹⁰ Jones v. Childs, 2 Dana, 35. Even where the judgment, at the time, had been suspended and was afterward affirmed (Swayer v. Crutchfield, 9 Bush, 415); a part of the heirs, defendants in ejectment, might after judgment sell their equity, and the grantee join with the other heirs in an injunction suit. (Cummins v. Latham, 4 Mon. 105.)

inction as to occupants who can not in good conscience claim to hold adversely, but who, if they hold on long enough, would bar the true owner out under the statute of limitations.¹¹ Aside from the circumstances of this case the owner of an undivided share, ousted by his co-tenants, is disabled from selling.¹²

Where part owners are out of possession, one of them may buy out the right of the others, and sue in his own name for the whole interest.¹³

Trespases on timber, though repeated, do not put the owner out of possession within the law of champerty, but the ideal possession of the adjoining owner to the "interference" (in a tract of land or house lot) is not enough to enable him to sell it, if it be occupied and claimed by his neighbor.¹⁴

The grantor may himself, as against the grantee, "elect to hold his title and enjoy the full and exclusive benefit of it."¹⁵ But under the maxim *in pari delicto* he can not ask a court of equity to assist him.

The two revisions have copied from the act of 1824 the unconstitutional¹⁶ clause which denounces a forfeiture to the Commonwealth, to inure to those in possession, upon any claimant who makes a contract with any one to manage a suit for lands adversely held "upon shares"; but no forfeiture is threatened for a champertous sale. But *before* bringing suit the champertous vendor must "rescind and abandon" the sale, otherwise the suit will fail.¹⁷ He can not exclude his own deed when trying his action against the adverse holder, on the ground that it is void, and the title still in him.¹⁸

¹¹ Barret v. Coburn, 3 Metc. 510, 515, quoting Baley v. Deakens, Castleman v. Combs, Jones v. Childs, Griffith v. Dicken, to show that a possession adverse under the limitation is not so under the champerty law.

¹² Wall v. Wayland, 2 Metc. 155; Adkins v. Whalin, 87 Ky. 153.

¹³ Russell v. Doyle, 84 Ky. 386.

¹⁴ Wickliffe v. Wilson, 2 B. M. 43; Young v. McCampbell, 6 J. J. Mar. 490; Russell v. Doyle, 84 Ky. 386.

¹⁵ Caldwell v. Sprigg, 7 Dana, 38.

¹⁶ So intimated in Redman v. Reid,

supra, Crowley v. Vaughn, 11 Bush, 518; and see *supra*, Sec. 10, note quoting Buford v. Gaines.

¹⁷ Harman v. Brewster, 7 Bush, 385.

¹⁸ Luen v. Wilson, 85 Ky. 503. These two cases put the champertous grantor in a very bad plight, almost working a forfeiture in practice. The old cases, Redman v. Sanders, 2 Dana, 69, Violet v. Violet, *Ibid.* 326, Shepherd v. McIntire, 5 Dana, 577, all reviewed 7 Dana, 38, only condemn the grantor's suit when it is carried on for the benefit of the grantee.

CHAPTER XI.

JUDICIAL TITLES.

SEC. 68. Service of Notice.

SEC. 69. Constructive Service.

SEC. 70. Unknown Heirs, etc.

SEC. 71. Execution Sales.

SEC. 72. Judicial Sales.

SEC. 73. Commissioners' and Sheriffs' Deeds.

SEC. 74. Infants' Lands, etc., Before 1852.

SEC. 75. Infants' Lands, etc., 1852 to 1876.

SEC. 76. Infants' Lands and Kindred Subjects
Since 1876.

SEC. 77. Division and Dower.

SEC. 78. Jurisdiction of Matter and Parties.

SECTION 68. SERVICE OF NOTICE. The title to much land rests on the validity of a judgment. The land may have been sold on execution, which leads back to a judgment; or a court has ordered specific lands to be sold for debt or for division, or for the maintenance of an infant, etc., or for reinvestment; or has made partition or assigned dower, or decreed the legal title to the equitable owner, or has named or removed a trustee. We can not show here how to obtain such judicial titles, but only which, having been obtained, are void, and which are good, and to what extent.

Some of the proceedings are minutely regulated by statute, and the line must be drawn as to the requirements which are and those which are not jurisdictional. Often the judgment is rendered under the ordinary powers of the court. Hence the rules by which such a judgment is valid or void must be first considered. A void judgment leads to a void execution, to a void "replevy bond,"¹ and to a void sale bond. An exe-

¹ A bond given by the judgment defendant with a surety or sureties, either before execution is issued, when the clerk takes, approves, and attests it, or while the execution is in the hands of the sheriff, when that

cution issued under the void judgment, or on the replevy bond to stay it, or on a sale bond returned under a previous execution, are all equally void.

The judgment of any court is void if the defendant to be bound has not appeared, and has never been summoned or notified. But the return of the sheriff who served the writ can not (after the term in which judgment is rendered) be gainsayed, not even in an action to vacate the judgment for such false return,² unless the plaintiff was an accomplice, in which case the rules of equity as well as the Code of Practice (Section 579 of '54, Section 518 of '76) authorize the setting aside of the judgment for fraud. But even then the title of a purchaser in good faith for value, completed before the suit to vacate is begun, would not be affected.

Even where the statements in the record as to the notice are vague, parol proof is not admitted to contradict it.³

The record must show the appearance or service of notice affirmatively (unless it be a judgment against the plaintiff either for costs, or upon a counter-claim or set-off). A personal judgment is void if the record shows constructive service only.⁴ A judgment for the Commonwealth against a sheriff and his sureties requires a "notice of motion," unless when the law gives the notice of time and place for asking the judgment.⁵ But the common law rule, that judgment may be rendered against bail upon two returns of *nihil*, as the re-

officer takes and attests the bond and approves the surety, in either case payable in three months from date, and enforceable by execution like a judgment; such execution being indorsed "no security of any kind to be taken." (See Gen. Stat., Ch. 38, Art. VIII.) Similar laws existed in Kentucky since 1792. (Litt. Laws Ky., I, 139.) The refusal of the court to quash the replevy bond is made the test of the judgment not being void, in *Johnson v. City of Louisville*, 11 Bush, 527.

² *Thomas v. Ireland*, 11 Ky. Law

Rep. 103 (1889), relying on *Taylor v. Lewis*, 2 J. J. Mar. 400; *Smith v. Hornback*, 3 A. K. Mar. 329; *The Sergeant v. George*, 5 Litt. 199. The defendant's only remedy is against the sheriff. The false return here was alleged by the wife, whose husband and co-defendant had procured it.

³ *Bustard v. Gates*, 4 Dana, 429.

⁴ *Roberts v. Stowers*, 7 Bush, 295.

⁵ See Sec. 485 of C. P. of '54; Sec. 450 of '76, referring to Ch. 92, Art. XI, of Gen. Stat.; *Hall v. Commonwealth and Baker*, 8 Bush, 378, 383.

cognitor is already a *quasi* party, was sustained in 1822, in a suit on a judgment thus obtained in Virginia.⁶ No such proceeding is now known in Kentucky, but "notices" and "rules" may still be served by leaving a copy at the defendant's usual place of abode with a person over sixteen residing in the same family with him, and judgments may be based on these. (Code of Practice, Section 625.)

Before the Code of 1851 the actual service of a summons on an infant was not deemed necessary.⁷ Service on the statutory guardian, or guardian *ad litem*, was sufficient, and the appearance of other defendants, or service upon them, was held to confer power on the court to appoint a guardian *ad litem* for the infant defendants. The leading case, which has been much criticised and would hardly be followed to its full extent, is *BUSTARD v. GATES*, 1836. The court, in its lengthy opinion, speaks of a new rule promulgated by it, that infants should be actually served, and of the complaints of the bar about the inconvenience of such a rule. But in another case, following upon this in the same volume of reports, the same court says: "It seems that a guardian *ad litem* was appointed, and answered for the infant heirs of W. S. without service of process on them. It has been heretofore settled by this court that this is irregular, and that they are *not properly before the court*."⁸ A year later it was said:⁹

"The failure to have process executed on the infant defendants was not cured by the appointment and answer of a guardian *ad litem*. Such an appointment did not bring (them) before the court, *nor authorize* a decree affecting their interest."

Here is a conflict hard to reconcile, but the later cases settle the law in favor of the validity of such judgments.

The judgment leading to the execution sale and sheriff's deed, which was collaterally assailed in *Bustard v. Gates*, had been rendered summarily on "notice and motion," as author-

⁶ *Delano v. Topping*, 4 Dana, 448, 451. B. M. 105 (1848).

⁸ *Steele v. Taylor*, 4 Dana, 448, 451.

⁷ *Bustard v. Gates*, 4 Dana, 429, followed in *Bank of U. S. v. Cockran*, 9 Dana, 395; *Benningfield v. Reed*, 8

⁹ *Shropshire's heirs v. Reno*, 5 Dana, 583.

ized by law, in favor of a surety against his principal, but not in so many words against the principal's heirs. But the motion was against the heirs, all but one of them being infants.¹⁰ The record showed no service of notice before a guardian *ad litem* was appointed; there was an unserved notice in the papers; then the guardian's answer; then a recital in the judgment that the plaintiff had "filed and proved legal notice." This entry was (after a lapse of twenty years) held sufficient to sustain the judgment, on the ground that any one may serve such notice, and service *might* have been proved orally; and this, though the judgment and sheriff's sale were evidently procured by the husband of the one adult heiress to defraud her co-heirs of valuable lands.

As to a summons or subpoena against a person of unsound mind having a committee, the Court of Appeals sided with Chancellor Kent (2 J. C. R. 242) against Mitford in his Equity Pleadings, and held that service on the committee alone is sufficient, and the decree based on such service at all events not void.¹¹

Before the Code of 1851 a subpoena in chancery might have been served by any person, and the service proved by affidavit; the oath to be administered by the court or master, not by a justice of the peace, at least not before the act of 1820,¹² authorizing justices to administer the oath to "any bill, answer, plea or notice"—*query*, if after that act. An acknowledgment of service indorsed on the subpoena had to be proved before the court or its master, else it would not sustain a default,¹³ and the bare recital in the decree that the subpoena was served—without proof how it was appearing in the record—would not aid the indorsement on error, though perhaps it might on a collateral attack.

The act of 1835, establishing the Louisville Chancery Court, contemplates that the "marshal" and his deputies shall serve

¹⁰ We doubt whether the summary proceeding lay at all against any one but the original debtor.

¹¹ Cates v. Woodson, 2 Dana, 452.

¹² Trabue's h'rs v. Holt, 2 Bibb, 398;

M. and B. Stat., II, 900.

¹³ Peers v. Carter's heirs, 4 Litt, 268. But this was on appeal to the decree. its voidness was not involved.

all "writs and precepts," but is hardly definite enough to repeal the old rule as to serving subpoenas.¹⁴

The Code of 1851 put an end to the uncertainty about service on infants. These were to be summoned in all cases, before a court could gain jurisdiction over them or appoint a guardian; if over fourteen years, the service to be made on them simply; if under fourteen, "the service must be upon him and upon his father and guardian; or, if neither of these can be found, then upon his mother or any other white person having the care or control of the infant, or with whom he lives."¹⁵ The service upon a small child seems useless, but it brings knowledge of the action home to those having care of the child, while the guardian might be indifferent or unfaithful. Where a bailiff, in his affidavit of service, showed that he had delivered copies to the mother without stating that neither father or guardian could be found, the return was held worthless.¹⁶ When the sheriff or his deputy makes the return, and speaks of nothing beyond service on the infant, it will be presumed that he was over fourteen years of age, especially as another section (Section 75 in C. P. of 1854) only requires an officer in his return to state "the time of service and that a copy was delivered."¹⁷ Where the return of summons states that copies were delivered to the infant defendants, the delivery of copies to a guardian also is thereby negatived, and the infants under fourteen are not before the court; and that the father, being himself a defendant, also received a copy of the summons, does not help to bring the infant before the court.¹⁸

¹⁴ Loughb. Stat., p. 160.

¹⁵ Code of Prac. 1851, Sec. 102; 1854, Sec. 81.

¹⁶ Lloyd's adm'r v. McCauley's adm'r, 14 B. M. 540. Stanton's Code, p. 803, quotes from Simpson's adm'r v. Dunlap (MS. Op. Dec. 1857), that where the *officer* made a similar return, the presumption in his favor would help it out. A similar presumption was indulged as to a sheriff's return on a notice of motion, "executed by leaving a true copy of

the within with Mrs. G., wife of G. W. G., he not being at home," not stating that she was over sixteen years, and that it was left at his abode. (Fleece v. Goodrum, 1 Duvall, 806.)

¹⁷ Webber v. Webber, 1 Metc. 18. Approved in Cheatham v. Whitman, *infra*.

¹⁸ Beverly v. Perkins, 1 Duval, 251; Cheatham v. Whitman, 86 Ky. 614. So where an order of revivor is thus served on infants under fourteen. (Cox v. Story, 80 Ky. 64.)

The Code of 1876 (in force January 1, 1877) retains the distinction between those over and those under fourteen years, but a summons or notice is to be served on the latter *simply* by delivering a copy to the father, guardian, mother, or "person having charge of him"—in this order.¹⁹ By an amendment of January 16, 1882,²⁰ when any of these are plaintiffs, the copy must be served on the first in order who is not a plaintiff, or if all are (as shown by affidavit of one of them), the clerk appoints a guardian *ad litem*, on whom service can be had. A non-compliance with these rules leads to a void judgment.

Service on persons of unsound mind, under the Code, is made by delivering a copy both to him and to his committee, and now, in default of a committee, to the father, guardian, wife, or person having charge of him; on a married woman of unsound mind the extra copy is to be delivered to the committee; if there be none, to her husband; if the husband be plaintiff, necessarily to her committee, and upon a physician's certificate (returned with summons) that a delivery of the copy would be injurious, it need not be delivered to the person of unsound mind, but, under act of January 16, 1882, to such physician.²¹

The service of summons may be acknowledged by the defendant by a written indorsement, attested by a witness, whose affidavit serves for a return.²²

A summons for a prisoner in the penitentiary must be accompanied with copy of petition, and must be served on the

¹⁹ Section 52 (corr. to Sec. 81 of old Code): And the statutory guardian may answer without having been summoned. (*Smoot v. Boyd*, 87 Ky. 642.)

²⁰ See Carroll's Code, under Sec. 52. A decree rendered before this act, where the father and guardian was plaintiff in his own interest, and the service for the infant was made on him, was re-probated as improper, but not held void. (*Schuler v. Mays*, 5 Ky. L. R. 831.)

²¹ Sec. 53 and amendment under same in Carroll's Code. The Code of 1854 requires the service on one in charge of the lunatic only when he is found such judicially or is confined as such; the Code of '76, as to every person of an unsound mind. Thus a judgment may turn out void on a matter outside the record (the lunacy of the defendant); see *dictum* in *Bean v. Haffendorfer*, 84 Ky. 685.

²² Sec. 50 (1876); Sec. 76 (1854).

keeper, who shall deliver the copies to the prisoner; a copy must also be left with his curator, if any, or wife, or at his last residence (if known), with some person over sixteen.²³

The provisions of the Code as to serving counties, municipal and private corporations, common carriers, and Shaker communities are not likely to come up in connection with judicial or execution sales, and need not be discussed.²⁴

The Codes of Practice of 1851 and 1854 gave to the plaintiff seeking any relief *in rem* the right to serve process outside of the State, by having served on any defendant a summons warning him to appear within sixty days after service, a certified copy of the petition being annexed to the summons, and of course to the copy that is delivered. The return must be under oath; must show time and place of delivery, also that "the defendant was personally known to the affiant" (who made service), and the officer taking the affidavit must certify that the affiant is personally known to him as worthy of credit. No personal judgment can be taken on such process, but for obtaining a judgment *in rem* it is deemed *actual* process, not constructive. Under the new Code such service can not be had on infants (other than married women), persons of unsound mind, or prisoners.²⁵

The Revised Statutes²⁶ having authorized a surety paying a joint judgment against himself and principal to obtain upon motion a transfer thereof to himself, after paying it (and so as to a co-obligor paying more than his share), but saying nothing as to any notice of such motion to be given to the principal, it was, nevertheless, held by the Court of Appeals that such a transfer of a judgment, which at common law is extin-

²³ Sec. 54 (1876); Sec. 88 (1854).

²⁴ See, however, Sections 51 and 55 (1876); Sections 77-80 and 84 (1854).

²⁵ Code of 1854, Sec. 86; 1876, Sec. 56. A provision in the old Code, that such return should be "filed," gave some trouble, and is omitted in the new Code. The returned "summons with certified copy of petition" is treated like any other returned

process. In chancery cases such process in substantially the same form is given already by Section 8 of Act of February 2, 1837 (Loughb. Stat. 15, Sess. Acts, 108), to be served within the United States, and sworn to before a mayor, notary, or justice.

²⁶ Rev. Stat., Chap. 97, Sec. 8; Gen. Stat., Chap. 104, Sec. 8.

guished by payment, is practically a new judgment, and the order, unless made upon previous notice to the principal, is void.²⁷

Where, of several defendants, some are summoned and some not, a plea or an order of court purporting to put in an appearance of the defendants is construed as meaning those only who have been summoned.²⁸

Where an amendment to the petition sets up a new cause of action there must be process upon it, otherwise not.²⁹

The rule stated by Freeman on Judgments (Section 136), that a judgment void as against one defendant will be held void as against another bound with him for the same debt, has not been followed in Kentucky, and would probably not be followed in any case, either in error or on a collateral attack.³⁰

SEC. 69. CONSTRUCTIVE SERVICE. A Virginia act of 1774 already authorized proceedings by publication in equity suits against absent defendants. It was substantially re-enacted December 12, 1796,¹ and might be applied though the complainants were themselves non-residents, and alike whether the defendant to be reached was a non-resident, or absent for the time being only.² It provides for suits involving title to, or liens or claims against lands,³ but not for attaching the lands of non-residents for debt. To bring a defendant before the court under this law, there must be :

First : An affidavit that " such defendant, etc., is out of the county " (though the act by its own words is only to govern suits where the defendant is out of this *country*)—that is, absent from Kentucky, and the proceedings would, in any other

²⁷ Veach v. Wickersham, 11 Bush, 261.

²⁸ Crump v. Bennett, 2 Litt. 213; Violet v. Waters, 1 J. J. Mar. 303. In these cases judgments against the defendants not summoned were reversed as erroneous, but it seems clear that they were void. The present Code of Practice allows no appeal from a void judgment, but only from the refusal of the court below

to declare it void. (Section 763).

²⁹ Joyes v. Hamilton, 10 Bush, 544.

³⁰ *Ibid.*

¹ M. and B. Stat., I, 91; Litt. Laws Ky., I, 592.

² Aspinwall v. Chase, 3 A. K. Mar. 266, following the construction of the Virginia act.

³ Applegate v. Lexington & Carter County Mining Co., 117 U. S. 255, and many old cases.

state of case, be void), "or that upon enquiry at his usual place of abode he could not be found."

Second: An order of court, naming a day in the succeeding term for such defendant's appearance. To name the term generally does not make a good warning order.⁴

Third: "Which order shall be forthwith published in the Kentucky Gazette or Herald" for "two months successively"—eight weeks is not enough.⁵

Fourth: "And shall also be published on some Sunday, etc., in such church, etc., as the court may direct, and another copy shall be posted at the front door of said court-house." To post the order at the church door is not a compliance; it should be read or proclaimed "after divine service;"⁶ but this whole requirement is done away with by act of December 22, 1803.⁷

The Supreme Court of the United States, in 1885, took the ground that the law (before 1803) says nothing about proof of publication; hence, when the order of appearance is made at one term, and the *pro confesso* order on or after the day named in the next, it will be presumed that the court had before it sufficient proof of publication to uphold its subsequent decree.⁸ In the land suit in which this decree was relied upon the newspaper publication was proved *in pais*, that in the church and at the court-house door was not, and the decree was held valid. This conflicts with an old Kentucky decision containing these words:⁹ "But a recital of facts in a decree in chancery where the evidence thereof must be filed, and the evidence does not appear in the record, can not be taken as true," and declaring such decree void for want of proof of publication in the record, though further because positive defects in the publication were seen in the

⁴ Milam v. Thompson, 7 Mon. 824.

⁵ Cravens v. Dyer, 1 Litt. 158.

⁶ Green's h'rs v. Breckinridge's h'rs, 4 Mon. 541.

⁷ M. and B. Stat., I, p. 95; Litt. Laws Ky., III, 108.

⁸ Applegate v. Lexington, etc., Min-

ing Co., 117 U. S. 255.

⁹ Green's h'rs v. Breckinridge's h'rs, which is quoted in the S. C. by appellee's counsel, follows Peers v. Carter, 4 Litt 268. See Sec. 67. It is approved in 1870 in Brownfield v. Dyer, 7 Bush, 507.

record. But in a later case, a recital that the order for appearance was "duly published" was deemed sufficient to save the decree from being void, and leaving it only erroneous.¹⁰

The act of 1803, which dispenses with other means of publicity, makes the certificate of "the printer in whose paper, etc.," with a copy of the printed publication attached, proof that the advertisement was made, and as this certificate is a return of process its absence ought to render the decree void.¹¹ In the earlier cases the court says "editor" for "printer," and defines him as one "who conducts the paper." Otherwise the court undertook to construe the act strictly, saying¹² that the published order is bad for not naming the term at which it is entered; or for warning the defendant to appear at the next "April term" without giving the year of such term, or of its own date; and the certificate is bad for not showing in what two months the advertisement appeared; and so, if the editor signs by deputy, or if the signer does not style himself editor; but when the certificate is fair on its face, it must be taken for true, like the return of process. But in 1831 the court, on full argument, held that the statute means the "printer and proprietor," not the "editor," who may be a mere employe, and the certificate to be good should appear to be made by the "printer and proprietor." This is followed in two cases in 1832, in one of which a defendant is said not to be before the court because the certificate was not made by "*the printer in whose paper, etc.*," but by the editor only.¹³

An act of January 25, 1827,^{13a} gave to courts of equity cognizance of suits by creditors against the non-resident owners of lands, the bill to be sworn to, and publication to be

¹⁰ Sidwell v. Worthington's heirs, 8 Dana, 74. The case as reported does not show whether the publication was made before the act of 1803, which provides for the printer's certificate of publication.

¹¹ Evans v. Benton, 3 Mon. 390. See next section, n. 4, for a very strong case.

¹² Miller v. Hall & Hanks, *Ibid.* 243.

¹³ Brown v. Woods, 6 J. J. Mar. 18; Sprague v. Sprague, 7 J. J. Mar. 331; Hay v. McKinney, 7 J. J. Mar. 441. So, if the printed order of appearance is not attached, the certificate is bad. (Ferrit v. Combs, 7 J. J. Mar. 247.)

^{13a} M. and B. Stat., I, 98; Sess. Acts, 1826, p. 158.

made in "some authorized newspaper," the provisions of the act of 1796 to apply otherwise. Before this act the lands of absent defendants could not be reached by a mere creditor.¹⁴ But where the absent debtor had fraudulently sold his lands, and a creditor brought suit against him and the grantee to set the conveyance aside and raise the debt by sale of the land, the jurisdiction was affirmed, as the Chancellor's power to set aside fraudulent conveyances brought the case within the act of 1796.¹⁵

In 1828 the right was given to sureties to proceed in chancery against the lands of their principals.¹⁶ Decrees under the acts of 1827 and 1828 must be tested by the acts of 1796 and 1803, as construed above.

A radical change was effected by the act of February 2, 1837;¹⁷ the order of publication is done away with, "but upon the filing of any bill against any absent or non-resident defendants, etc., it shall be the duty of the court to cause an order to be made on the order book warning and requiring the defendant, etc., to appear and answer the complainant's bill on or before the first day of the ensuing term, etc." It was thought that the "traverse" (that is, general denial) to be put in by the clerk for non-appearing defendants, and the refunding bond which the complainant had to give before drawing any funds arising from his decree out of court, with the right reserved to the absent defendant to open the decree within seven years, is a better protection to him than a newspaper notice. An amendatory act¹⁸ directs that the court on entering the order for appearance shall also appoint an "attorney to defend," whose first duty it is to inform the absentees; certainly a better means for bringing notice home to them than the newspaper; but the failure to appoint the attorney does not, under this act, avoid the decree.

¹⁴ *Harris' heirs v. Bryan's ex'rs*, 7 J. J. Mar. 876.

¹⁵ *Scott v. McMillen*, 1 Litt. 302 (1822), where the debtor's absence was thought to dispense with the previous judgment and return of *nulla bona*.

¹⁶ M. and B. Stat., II, 1441, 1442 (Sec. 3); Sess. Acts, p. 134.

¹⁷ Loughb. Stat. 12-15; Sess. Acts, p. 103.

¹⁸ February 15, 1888, Loughb. Stat. 17; Sess. Acts, 202.

The Code of Practice of 1851 and of 1854¹⁹ makes one rule for all cases of constructive service, in law or equity, in which a judgment *quasi in rem* is sought.

There must be, *First*: The affidavit of the plaintiff (or, when he is absent from the county, of his agent or attorney), to be laid before the clerk, or anybody's²⁰ affidavit, to be passed upon by the court, showing one of the following grounds: that the defendant is—

1. A foreign corporation having no agent in this State, or
2. A non-resident of this State;
3. Has departed from the State with intent to delay or defraud his creditors;
4. Has been absent from the State four months;
5. Has left the county of his residence to avoid the service of a summons;
6. Conceals himself so that a summons can not be served upon him.

Second: The clerk or the court makes the "warning order" for the first day of the term, that is, at least sixty days off (in Louisville Chancery Court to appear within sixty days), the former on the "petition," the latter on its minutes.

Third: The clerk or court appoints an attorney to defend; but, again, a failure herein does not avoid the judgment.²¹

On the thirtieth day after the warning order the defendant is deemed to be summoned (Section 91 of C. P., 1854). An order warning the defendant to appear sooner than the time named in the law is void.²²

It was held, in a very important case, that where the court had made the warning order the absence of the affidavit

¹⁹ Secs. 88, 89, 91, of Code of 1854. The Code of 1851 left some classes of suits (those for divorce and alimony, settlements of decedents' estates, proceedings to establish or set aside a will, caveats, and writs of *ad quod damnum*, etc.), in all of which there might be constructive service; under the old law, and in such of those as were brought before July 1, 1854,

constructive service must be tested by it.

²⁰ So it is, construed literally, some one else than the plaintiff, his agent, etc., should make the affidavit for the court.

²¹ So held in *Thoman v. Mahone*, 9 Bush, 111.

²² *Brownfield v. Dyer*, 7 Bush, 505, 507.

did not avoid the proceedings, as the court might have heard or read proof not in the record; but the decree (one of divorce) was nevertheless held void, because the defendant therein was found not to have been a non-resident, nor, for the purpose of the case, absent from the State for four months,²³ a theory rather dangerous to titles resting on judgments rendered on constructive service. Neither position taken in this case could well apply to proceedings taken under the Code of 1876.

Here the first and second grounds are worded thus:

1. A corporation having no agent in this State known to the plaintiff upon whom a summons can be lawfully served.

2. A non-resident of this State, and believed to be absent therefrom.

The other grounds are left as in the older Code. The warning order and appointment of attorney must in all cases be made by the clerk; the time for appearance is not changed (sixty days in the courts for Jefferson County which have no terms), but the defendant is not deemed summoned until the thirtieth day after the warning order *and* appointment of attorney. Hence the failure to make such appointment is fatal.

The section (58 of C. P. of 1876)²⁴ which regulates the affi-

²³ Newcomb's ex'r v. Newcomb, 13 Bush, 544. And this view seems to have been followed by J. Holt, for the majority, in case of Paul v. Smith, 82 Ky. 451, where he thought the warning order valid notwithstanding a slight defect in the grounds under the temporary attachment law of the civil war.

²⁴ The plaintiff must, if present, make the affidavit himself, except as to grounds 5 and 6; he must, if he can, give the country of residence and the post-office of the defendant (when grounds 1, 2, and 4 are relied on); an agent or attorney must state that he is such, and that his principal is absent from the county, and must swear to his belief that the facts unknown

to him are unknown to plaintiff; instead of an affidavit on grounds 5 and 6, the return of the officer on a summons may be taken, but, "6. An affidavit made pursuant to the foregoing provisions of this section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order." This ought to preclude a court in a collateral attack upon the judgment from inquiring whether the facts for the warning order existed, if they are properly shown in the affidavit for the order; but we can not say that such a view will be taken by the Court of Appeals.

davit is very precise, contrived earnestly to bring notice home to the defendant; whether a disregard of its provisions would render the proceedings void has never been decided, but Section 60 would indicate the contrary, for "a defendant against whom a warning order is made and for whom an attorney has been appointed" is said to be summoned, without regard as to the steps preceding such order and appointment. And the failure of the appointed attorney in his duties, or the absence of the refunding bond to the non-residents is not fatal."

In 1861,²⁵ the *voluntary* withdrawing of many residents of Kentucky within the Confederate lines gave rise to a statute which made such withdrawing (stated in three different forms) ground for an attachment and for a warning order. Though the defendants thus warned were by the laws of war prevented from appearing, and the appointed attorney could not even communicate with them, yet judgments obtained on warning orders under this law were sustained,²⁶ and a defective statement of the grounds would not render a judgment for sale of attached lands void,²⁷ as the jurisdiction in all such cases depends on the existence and levy, not on the rightfulness of the attachment.²⁸

But under another section (Section 449 in C. P. of 1854, Section 418 in C. P. of 1876) "no lien on the property of a defendant constructively summoned shall be created otherwise than by an attachment, as is provided, etc., or by judgment, etc.;" hence there must be "an order of attachment" granted, issued, and effectually levied before a creditor who neither has

²⁵ "An act to amend the Code of Practice in Civil Cases," December 23, 1861. (Myers' Suppl., p. 38.)

²⁶ Thomas v. Mahone, 9 Bush, 111, distinguished from the decision of the Supreme Court U. S. in Dean v. Nelson, 10 Wall., in this, that the defendant under the Kentucky law must have gone voluntarily into the enemy's country.

²⁷ Paul v. Smith, *supra*, n. 24, where the majority rejects the rule found in

Drake on Attachments, Sec. 876.

²⁸ Bailey v. Beadles & Bolinger, 7 Bush, 383, relying on Allen v. Brown, 4 Metc. 885. The mode of levy on lands is prescribed in Section 208 of Code (Section 228 of '54); presumption is in favor of a proper levy, where the return describes the land and says it was generally levied on, and otherwise that the officer did his duty. (Anderson v. Sutton, 2 Duval, 480; Quinker v. Lewis, 2 Met. 284.)

a judgment, execution, and return of "no property," nor a lien enforceable in equity, can have a valid judgment to sell the absent debtor's property. (He might have had it under the act of 1827.) A judicial sale for an unsecured debt, on nothing but a "petition in equity" and warning order is void.²⁹ And if the attachment is not issued at or after the commencement of the suit, that is, at or after the issual of a lawful summons or entry of a warning order, it is a nullity and will not sustain the decree.³⁰ The rule is not applied to a suit by a creditor for subjecting the lands of a deceased debtor owned by absent heirs or devisees, or on behalf of all the creditors to "settle" the estate. In fact, an attachment can not be had in such a case.

The Code (both old, Section 448, and new, Section 417) allows a judgment rendered on warning order to be opened within five years, but "the title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by the new trial, etc., except the title to property obtained by the plaintiff and not bought of him in good faith by others."

Under the new Code (Section 763) the defendant against whom judgment is rendered on constructive service can not appeal from it, but must first open it in the court below. Formerly he could appeal, and, upon a reversal remanding the cause, he was deemed before the court by his own appearance.³¹

In modern practice a newspaper notice serves as process in two classes of cases :

1. In a suit to wind up a decedent's estate, or an assignment for the benefit of creditors, or the estate of one attempting

²⁹ Grigsby v. Barr, 14 Bush, 330. This, coupled with Yeager v. Groves, 78 Ky. 279 (see *supra* Section 19, n. 2) has thrown a cloud on some titles coming through attachments against non-residents in the Louisville Chancery Court, where for many years the attachment was written on the back of the summons, without the heading

in the name of the Commonwealth.

³⁰ A summons on "the unknown children of A. B." is a nullity, and does not sustain the attachment which follows it, but precedes a warning order. (Kellar v. Stanley, 86 Ky. 240.)

³¹ Salter v. Dunn, 1 Bush, 311.

an unlawful preference (General Statutes, Chapter 44, Article II), the creditors must be required to appear before the Master in Chancery "by advertisement in a newspaper, or if none be published in the county, then by such other means as the court may deem best," and if the reference in vacation is made by the clerk he shall (for want of a newspaper) have the notice posted at the court-house door and two or more public places in the county.³²

The failure to so advertise would, it seems, leave the estate still subject to a lien for the demands of creditors who should not appear.

2. By an act of 1866, engrafted into the General Statutes, a court of equity may confer on a married woman some or all of the powers of a *feme sole*; ³³ but it has no jurisdiction "until notice of the filing of the petition, and the object thereof, shall be published at least ten days in a newspaper designated by the court, and a copy of the notice and proof shall be filed in the action."

It was held that one insertion, made ten days or more before the court is to act, is enough; that if the publication has taken place, a defect in the proof, or a failure to file it, leads only to error, not voidness in the decree, and that the subsequent approval of the newspaper is equivalent to its previous designation.³⁴

NOTE.—An old practice act gave in lieu of outlawry a process of newspaper publication after three returns of *non est inventus*. (See Litt. Laws Ky., I, 84, 584.) But the law became harmless, when the Court, under old Virginia laws (no longer in force), held that a sheriff, knowing a defendant to be an inhabitant of another county or State, must return him as such, and not as "*non inventus*." (Snead v. Wiester, 2 A. K. Mar. 277.) For the law authorizing publication in "real actions," *i. e.*, writs of right, which were extremely rare, being allowed only after the "taking of esplees" by the demandant or his ancestor, and thus not applicable to wild lands, see M. and B. Statutes, I, 102; Litt. Laws Kentucky, II, 1.

³² C. P. 1876, Secs. 430, 431, 438.

³³ Feb. 14, 188—, Myers' Suppl. 728; Gen. Stat., Ch. 52, Art. II, Sec. 6.

³⁴ Hart v. Grigsby, 14 Bush, 542; Dunn's ex'r v. Shearer, *Ibid.* 574; Mann v. Martin, *Ibid.* 768. All these

were cases in which the contracts or property rights of the made *feme sole* were drawn in question; the validity of her deed to land might come up in like manner.

SEC. 70. UNKNOWN HEIRS, ETC. The practice of suing "unknown heirs" was first introduced by an act of December 16, 1802.¹ A suit in equity might be instituted by any one who "claims land as locator, or by bond or other instrument in writing," against the heirs to whom a legal title has descended, though their names be unknown and "not named in the suit, and though they may be residents of this Commonwealth or not;" "it"—meaning the order of appearance defined in the act of 1796 about absent defendants—"shall be advertised eight weeks in one of the gazettes of the State."² The act is made applicable to suits already pending; but, as it was thought by many to govern suits for division of land only, another act was passed in 1815,³ extending the same rule to all suits in chancery against the heirs of any decedent, where the names are not known; but the "complainant" must file with the "bill an affidavit stating that he or she does not know the names of the heirs." The bill containing such averment, and being sworn to, answers the requirement; whether each of the several complainants must negative his own knowledge is left undetermined.⁴ But a defect in the oath (for instance, the counsel making it, instead of the complainant) renders the proceeding only erroneous and voidable, not void.⁵ "Yet it is an *ex parte* proceeding and liable to be assailed in many ways, and must therefore be strictly pursued;" and if the land in question was devised or conveyed, the decree against heirs would of course be of no effect.⁶

¹ M. and B. Stat., I, 95; Litt. Laws Ky., III, 9.

² Eight weeks as distinguished from the two months against absent defendants. (Barclay v. Hendricks, 4 Mon. 252.)

³ M. and B. Stat., I, 97; 9 Litt. L. Ky., V, 264.

⁴ Brown v. Crump, 6 J. J. Mar. 18.

⁵ Tevis' repr's v. Richardson's hr's, 7 Mon. 657.

⁶ It was held on "bill of review," which would reach mere errors, in 1838, that each complainant must

swear to the want of knowledge, but it is not said that the decree would be void for want of such oath; Jeffrey's heirs v. Hand's heirs, 7 Dana, 89, and Benningfield v. Reed, 8 B. M. 103, decide it is not void. The proceedings may be set aside for fraud, if the heirs were so placed that the complainant could have easily found them, and this rule would apply now. A suit in chancery would lie against the unknown heirs of debtor, to reach lands fraudulently conveyed; Tharp v. Feltz's adm'r, 6 B. M. 6, 16.

And in a late case it was held, that where the printer's certificate left it in doubt, but that one of the insertions took place after the day for appearance, the proceedings were "not only voidable, but void."⁷

The act of 1837, referred to in the preceding section, dispenses with newspaper publication in proceedings against unknown heirs, as well as in those against absent defendants; the act of 1838 providing an attorney for defendants constructively summoned applies also to unknown heirs.

Under the Code of 1851 and 1854 (Section 90 of the latter), "where, in an action against the heirs of a deceased person as unknown heirs, or against other persons made defendants as unknown owners of land to be divided or disposed of in the action, it appears by the petition that the names of such heirs, or of any of them, etc., are unknown to the plaintiff, a warning order" shall be made as against absent defendants (see preceding section), and the same subsequent proceedings follow. The validity of the judgment would be tested by the like rules. In the Code of 1876 (Section 57), the plaintiff's ignorance of a defendant's name is simply made an additional or seventh ground for a warning order, thus: "7. If his name and place of residence be unknown to the plaintiff;" and if the affidavit for the warning order is made by agent or attorney, he must swear to his "belief that the plaintiff is ignorant of such facts as are unknown to the affiant." Thus unknown devisees can be reached under the Code as well as unknown heirs. No cases are reported construing these sections in either of the Codes of Practice.

SEC. 71. EXECUTION SALES. The first Kentucky act¹ which subjected lands to the payment of debts was passed December 17, 1792. Henceforth, in a *fiery facias* the word "estate" was to be put in place of "goods and chattels, and all lands, tenements, etc.," to which an act of 1798 added "in possession, reversion, or remainder" might be levied on and

⁷ Berryman v. Mullins, 8 B. M. 152.

¹ Litt. Laws Ky., I, 128, based on a Virginia act of 1787 allowing levy on land at suit of the Commonwealth. Amendment of 1798, Sec. 8 (see M.

and B. 1625, Litt. Laws Ky., IV, 581), authorizes sale of land under *fi. fa.* from U. S. courts. (Winslow v. Austin, 5 J. J. Mar. 408.)

sold under such writ. They are bound from the time the writ comes to the officer's hands, and such is the law yet, the judgment itself not being a lien. Lands were to be levied on for want of sufficient chattels and slaves. There was no advertisement, but a notice of from ten to twenty days to the defendant owner. If the commissioners appraising the land believe a sale for cash will result in less than three fourths of the appraised value, the sale was on a credit of three months. Neither the sheriff nor his deputy may bid on the lands, even as agent for another, nor have an interest in the bid. If there be land more than sufficient, it is to be sold "in parcels," or, as the act 1798 says, "in one or more entire parcels," and a sale of a smaller number (f. i. 190 out of 600 acres) without laying them off, turning the defendant and the purchaser into tenants in common, is void.² Lands in the settled parts were sold on the premises; wild lands at such settled place as the owner may designate, or, in default of such designation, at the court-house door. Executions might be sent to sheriffs of other counties on terms stated in the act. With slight changes (mainly in 1821) the law stood thus till 1828,

It was held under the early statutes: That a *fi. fa.* may issue on a decree for money, and land be sold under it; that land can not be sold for any demand arising before December 17, 1792, and if sold therefor no title passes.³

Further, a mere equity, such as land held under a title bond, can not be sold under a *fi. fa.*, but an "entry" or "survey" is such an "inchoate title as may be taken and sold,"⁴ and an express naked trust under an act of 1796.⁵ The sale to a purchaser in good faith can not be annulled, because

² *Marmaduke v. Tennent's heirs*, 8 B. M. 210.

³ *Barbour v. Breckinridge*, 4 Bibb, 548. Hard to find a reason in the act or elsewhere.

⁴ *Thomas v. Marshall*, Hard. 19. But when the defendant gives up some one tract to be sold (as pro-

vided by law), he is estopped from denying that his title was subject to sale. (*Major v. Deer*, 4 J. J. Mar. 589; *Reid v. Heasley*, 2 B. M. 256; *Moore v. Simpson*, 3 Met. 351.)

⁵ M. and B., I, 448; Litt. Laws of Ky., I, 572 (Sec. 13).

there was a sufficiency of chattels,⁶ nor because the execution was sent to a foreign county without the preliminaries required by law, nor even if the judgment was paid in whole or part as long as the credit does not appear on the execution.⁷

Before 1852 an execution could not issue upon a judgment after the lapse of a year and a day without a *scire facias*. Whether the proceedings under one issued after a year and a day would be void is left somewhat in doubt, but a purchase by the plaintiff under such execution could certainly not stand.⁸ But one execution having been issued within the year and day, others might follow at long intervals.⁹

That the return day of the execution is either too near or too far off (less than thirty or more than ninety, now seventy, days from the *teste*) does not render a sale under it void, nor should the writ be quashed;¹⁰ and if a levy is made before the return day, the sale may take place after it.¹¹ But where the land is levied on during the defendant's lifetime it can not, with or without a *venditioni exponas*, be sold after his death, unless upon proper revivor;¹² the sale is void, but the lien of the writ is kept alive.¹³ Though the statutes, new and old, require a deputy to sign his own and his principal's name, the omission of either name to the return is not fatal.¹⁴ When the

⁶ *Hayden v. Dunlap*, 3 Bibb, 216; *Faris v. Banton*, 6 J. J. Mar. 237: These duties of the sheriff are said to be "directory" only. (See also *Bee-ler v. Bullitt*, 3 A. K. Mar. 281.)

⁷ *Cox v. Nelson*, 1 Mon. 94; *McConnell v. Brown*, 3 Mon. 579; *Bishops v. Gregory*, 5 B. M. 860; *Walker v. McKnight*, 15 B. M. 476; *Coleman v. Trabue*, 2 Bibb, 518.

⁸ *Hoskins v. Helm*, 4 Litt. 310.

⁹ *Craig v. Johnson*, Hard. 520. But where the execution is void, *e. g.*, where it is issued on a bond which, if regular, would have, but in fact has not, the force of a judgment, it is not aided by the defendant giving up land to be sold under it, and no title will pass. (*Ditto v. Geoghegan*, 1 Met. 169.) It was issued on a forth-

coming bond, given under an execution on a replevy bond, on which no security must be taken.

¹⁰ *Goode v. Miller*, 78 Ky. 235.

¹¹ *Colyer v. Higgins*, 1 Duval, 6; *Savings Institution v. Chinn's adm'r*, 7 Bush, 542.

¹² *Holeman's ex'r v. Holeman's heirs*, 2 Bush, 515; *Burge's adm'r v. Brown*, 5 Bush, 538. In *Huston v. Duncan*, 1 Bush, 205, the reason is given that the sheriff gains no possession, and therefore no title by the levy; hence the unencumbered title passes to the heirs.

¹³ *Ibid.*, and comp. *Huston v. Duncan*, 1 Bush, 207.

¹⁴ *Winslow v. Austin*, 5 J. J. Mar. 408; *Humphrey's ex'r v. Wade*, 84 Ky. 391.

sheriff has once levied he can sell, though he have meanwhile ceased to hold the office.¹⁵ Thus it is important to know wherein a levy on land consists. The definition was first given in 1849:

1. The sheriff must either go on the land or obtain the defendant's assent to a levy on the particular tract, or notify him thereof.

2. He must "make an official and specific entry upon the execution or on some paper thereto attached, of the estates and the levy."¹⁶ But, as said in a very late case, this entry need not be written out at the time. Where the sheriff had set down only the date and the word "levied," and the defendant died, he was allowed to write out the description afterward, and to prove by parol that he had "levied" at the time, by notification to the defendant; and thus the lien was preserved.^{16a}

What "entry of the estate," *i. e.*, what description is necessary, will be discussed in connection with the sheriff's deed. The levy should specify the defendant's interest, whether for life, in fee, etc., whether in severalty or an undivided share, and what share; though a levy on the fee would carry any smaller interest, and to levy on a smaller interest than defendant owns, though irregular, would not prevent the title to such smaller interest from passing by the sale. Even where a joint sale of several parcels, the plaintiff in the writ being purchaser, was set aside as fraudulent, it was said that such sale was not void *per se*,¹⁷ though it might be so under modern statutes.

Should the sheriff sell more land than what the writ calls for, the sale is void *in toto*, and can be ratified only by such a writing as would pass the estate.¹⁸ An excess of a few cents,

¹⁵ Demint v. Thompson, 80 Ky. 255.

¹⁶ Lofland v. Ewing, 5 Litt. 42, and next case.

^{16a} McBurnie v. Overstreet, 8 B. M. 800, and *passim*.

¹⁷ Daugherty v. Linthicum, 8 Dana, 194. (See also Wickliffe v. Bascom,

7 B. M. 681, 688.) Land may be sold under several executions jointly, though some call for credit sales, others being on replevy bonds for cash sales. (Locke v. Coleman, 4 Mon. 318.)

¹⁸ "Under the Statute of Frauds" is said in Pepper v. Commonwealth,

or even of five dollars, arising from mistake, will be excused on the maxim *de minimis*, if no more land was sold than would have been needed to raise the exact sum.¹⁹

The execution law of 1828 (in force June 1),²⁰ though long and minute, introduces but little change in the sale of lands. They must now be made "in the court yard" of the county, and to the highest bidder, on a "court day," i. e., on the first day of a term, after ten days' advertising by bills posted at three public places (unless waived by written consent). Where the execution is subject to replevy, the sale is on a credit of three months. Lands levied upon are to be valued (on a coin basis), and if they do not bring two thirds of the appraised value the purchase is subject to a year's redemption. This rule has been retained under all subsequent revisions; and unless bad faith can be shown on the part of the execution plaintiff, the sheriff, or the appraisers, the defendant is concluded by the appraisement, though there may have been a great error of judgment, and if the bid equals two thirds of the appraised, though not of the real value, the defendant will not be allowed, on application to a court of equity, to redeem.²¹

The valuation and redemption does not apply under this act to land given up by the defendant and lying in a county other than that in which he resides, or in which the judgment

6 Mon. 30, and this is followed up by many decisions, *e. g.*, *Stover v. Boswell*, 3 Dana, 236; *Isaacs v. Gearheart*, 12 B. M. 231. Defendant is not estopped at law by assent to sale and receiving surplus; but where the execution defendant had waived the excess in the sale, the title was held to be good against attacks by subsequent execution levies. (*Thomas' adm'r v. Thomas' adm'r*, and *Tanty v. Butler*, 87 Ky. 343.)

¹⁹ *Adams v. Keiser*, 7 Dana, 209 (excess of 6½ cents); *Morrison v. Bruce*, 9 Dana, 211 (difference of \$5 in \$1,400); 245 out of 460 acres were sold off one side. The court intimates that defendant might be re-

lieved in land in proportion to excess. (See different ruling on excess in case of decretal sales in next section—reference to *Daniel v. McHenry*, 4 Bush, 281.) Section 812 of the Code of 1854 made an exception in certain cases of land sold by execution from Louisville Chancery Court.

²⁰ M. and B. Stat., I, 631; Sessions Acts of '28, p. 142. A clause in Section 35 of this act was held to allow execution sales of land in adverse possession. (*Frizzle v. Veach*, 1 Dana, 211.) If the sale day is a "court day" it suffices without the return saying so in so many words. (*Bell v. Weatherford*, 12 Bush, 506.)

²¹ *Lawrence v. Edelen*, 6 Bush, 55.

was given. (Nor, until 1834, to executions indorsed, that bank paper may be taken.) The right of redemption can be sold under execution, and the defendant may redeem against both sales within a year from the first.

In selling less than a whole tract under the twenty-eighth section of this act, which has ever since been kept in force, the officer selling must, after receiving a bid equal to the debt and costs for the whole, cry the land "to ascertain who will pay the debt, etc., for the least . . . portion of the land off of such side or end," the defendant having the right to designate the side; and if he fail to do so, then the officer must. It seems that a return of the execution, showing a sale of part, without reciting a compliance with this rule, would not carry the title. The part sold is to be valued again, with a view to the redemption law. But it was held,²¹ that the omission of the sheriff to perform this (or any other) duty, after the sale was fairly made can not annul the sale, and the defendant is remitted to his suit to redeem.

Section 36 of the act of 1828 re-enacts a statute of 1821,²² which makes a mortgagor's title subject to levy and sale. It was thought that this law applied only to land mortgaged after the date of that statute.²³ But the mortgagee's title, even when he was deemed the legal owner, could not be levied on and sold, nor can the whole estate be sold under a joint execution against mortgagor and mortgagee.²⁴

The Code of 1851 (see Section 431 of 1854, Section 401 of 1876) dispenses with the *scire facias* to revive a judgment after a year and a day. As long as it is not barred execution may issue, and by the Revised and General Statutes the bar is

²¹ Reid v. Heasley, 9 Dana, 324. (See Vallandigham v. Worthington, 85 Ky. 83.)

²² Omitted in M. and B. Stat. as superseded.

²³ Bell v. Com'th, etc., 1 J. J. Mar. 550, 555. If the land was sold under this law as an "equity of redemption" without appraisal, and it turned out that the mortgage had been paid

off before sale, nothing would pass. (Dougherty v. Linthicum, 8 Dana, 198.)

²⁴ Buck v. Sanders, 1 Dana, 188; which is with stronger reason so under the present statute. The sheriff need not in selling specify how much the mortgage is; the purchaser is referred to the record. (Bruce v. Shaw, 16 B. M. 80.)

fifteen years from its entry or from the date of the last execution. Should an execution issue after a longer interval, it will be quashed ; whether it is wholly void is undetermined.²⁵ The limitations of the Rev. Statutes came into force May 31, 1866.

The Revised Statutes come next. An appraisement is directed and a year's time to redeem, where less than two thirds is bid, with interest at the rate of ten per centum, and during the year the owner retains the possession.

The defendant is bound by the appraisement, though it may fall below the true value ; but should the appraisers have made a mistake as to quantity or location, it seems the execution defendant might, against the purchaser and volunteers under him, be relieved in equity.²⁶

An awkward proceeding is created by the Revised Statutes (Chapter 36, Article XV ; General Statutes, Chapter 38, Article XIV) for selling encumbered property. Where the defendant has owned the legal title and "has encumbered it by mortgage, deed of trust, or otherwise," the sale under execution will give to the purchaser only a lien for the amount of his bid, with ten per cent interest, which was to be enforced by suit in equity, subject to older encumbrances, and which is lost if at the chancery sale the property does not bring enough ; while, under the law of 1821 and 1828, the purchaser got all the title of the mortgagor. But this new rule did not, under the Revised Statutes, extend to a vendor's lien ;²⁷ but the execution bidder of lands thus and not otherwise encumbered

²⁵ Yeiser & Co. v. Lockhart, 2 Bush, 231, refers to Rev. Stat., Ch. 63 (Limitations), Art. II., Sec. 1.

²⁶ Vallandigham v. Worthington, 85 Ky. 88.

²⁷ Moriarty v. Vessey, 6 Bush, 115 ; Campbell v. Wooldridge, *Ibid.* 321. A mechanic's lien was deemed an encumbrance within meaning of Rev. Stat. (Brown v. Story's adm'r, 4 Met. 317). The purchaser may assail the encumbrance as fraudulent, or show that it is paid off, and thus advance his lien. (Atkins v. Emison, 10 Bush,

9.) It is hard to say what effect a sale under an execution would have, which is levied on land already levied under an order of attachment. Such a levy of an execution was held expressly valid in Oldham v. Scrivener, 3 B. M. 380, before the "Encumbered Estates law" of 1852 ; in Husbands v. Jones, 9 Bush, 218, some doubt is thrown upon it, but nothing is decided in the case, except the inferiority of the sale under the later to that under the earlier process.

would, subject to such lien, obtain a good title. To meet this point the words "encumbered by him for the purchase money" have been added in the General Statutes.

The latter also give to the purchaser a summary remedy to get possession of the land bought, and in doing so provides, among other things, that where the defendant's interest appears to be equitable, the court hearing the motion may act as a court of equity would in a judgment creditor's suit.²⁸ Hence the sale of an equity in land is no longer void, but that the sale of even an unencumbered equity (other than a naked trust) would give any thing more than a lien is very doubtful.

An execution from a Quarterly or a Justice's Court can not be levied on lands.²⁹ There is no reason why a judgment, say for costs, from the County Court, *e. g.*, in probate matters, should not be so levied, but the question has not been tested in any reported case.

Under Section 667 of the Code (and so under former laws) any "writ," when the sheriff is disqualified by interest or otherwise, may be addressed to and executed by the coroner, next by the jailer, next by any constable. This order must not be broken. An execution addressed to "coroner or jailer" implies that the coroner is qualified, and a sale of land under it by the jailer is void.³⁰

The lien of the execution may be lost by delay, or "abandoned," so as to let in a subsequent execution, or a purchaser, or the general creditors on the defendant's death. Three years in one case, two years in another, seventeen months in a third, were deemed sufficient to work an abandonment, and the notice which the record gives of the writ will not keep it alive.³¹

An act of March 6, 1878, requires the sheriff to turn over to the circuit clerk of his own county any execution sent to him from other counties, to be recorded like executions issuing

²⁸ Ch. 38, Art. XII, Sec. 11.

on land.

²⁹ "Or court of similar jurisdiction," Code of Prac. 1854, Sec. 846 (1876), Sec. 723, providing for transcripts from such courts to the Circuit Court with a view to a *fi. fa.* to be levied

³⁰ Gowdy v. Sanders, Law Rep. 1889, p. 82.

³¹ Owen v. Patteson, 6 B. M. 488; Deposit Bank v. Berry's adm'r, 2 Bush, 237.

from the clerk's own office; he is then to take it back and enforce it. The object is to enable those who examine the defendant's title to find the liens upon it; but it has been held that such lien is not lost by the failure of the clerk to record the "foreign" execution.³²

A sale under execution can not be disturbed by the subsequent reversal of the judgment, not even when the plaintiff is the purchaser; except for fraud, in which the purchaser has taken part.³³ On the other hand, if the judgment after levy of a *fi. fa.* be enjoined or superseded, the force of the writ is at an end, and is not relieved by a discharge of the injunction, or a dismissal of the appeal, or affirmance.³⁴ A replevy or other statutory bond, not taken in conformity with the law (*e. g.*, a replevy bond maturing in six months) has not the force of a judgment, and an execution thereon is void.³⁵

The law as to *de facto* officers is stated *supra* in Section 48.

Chancery will relieve the owner against the purchaser under execution, who, by a promise to allow redemption, lulls the vigilance of the owner and keeps him from an endeavor to obtain a better price. A *dictum* in an old and one late case support this statement,³⁶ aside of the analogy of clear and very late cases of judicial sales. (See next section.)

The methods of quashing execution sales for fraud or irregularity, either by motion or suit in equity, can not be treated here. The law on the merits is substantially the same as in other States, perhaps a little more liberal in favor of the execution debtor; the manner of proceeding by motion is given in Article XV of Chapter 38 of the General Statutes.

An execution on behalf of the Commonwealth against the sheriff and his sureties for the collection of State revenue carries its lien, under the revenue law of 1886, back to the commencement of the action or motion by which the judgment was obtained.³⁷ A title by execution or other coercive

³² Soaper v. Howard, 85 Ky. 256. This makes it necessary in examining a title to go to the sheriff's office for "foreign executions." (See act in B. and F. Gen. Stat., p. 585.)

³³ Reardon v. Searcy, 2 Bibb, 202.

³⁴ Keith v. Wilson, 3 Metc. 201.

³⁵ Vertrees v. Shean, 2 Metc. 292.

³⁶ Lillard v. Casey, 2 Bibb, 459; Dupuy v. McMillan, 2 Duv. 555.

³⁷ Revenue Act in B. and F. ed. G. St., p. 1086.

sale has been held in one respect to be weaker than that obtained by an ordinary purchaser. The statute declares that where the heir or devisee alien's land before suit brought, he shall be answerable to the creditors for the price, but the land in the hands of a *bona fide* purchaser shall not be liable. On some grounds, not stated, this protection is not granted to a purchaser under execution sale.³⁸

SEC. 72. JUDICIAL SALES. A judicial sale confers on the purchaser the title of all the parties who at the time of judgment rendered are "before the court." In a judgment or decree to sell land, a commissioner is always named to make the sale; in the Louisville Chancery, and Louisville Law and Equity Court, the Marshal of the court is, under the acts constituting the courts, designated to make all sales. A decree of sale has been held erroneous for not describing the land to be sold in its own body without reference to other papers; but it would not for such a defect be deemed void.

But the Commissioner is only the agent of the court, to whom he is to report, and the purchaser is not even the equitable owner till the sale is confirmed. Though the Court of Appeals, in 1873, broke up the practice then prevailing of "opening the bids" upon a proposed advance of ten per cent, yet the rule was still recognized,¹ "that a party purchasing at such sales becomes only an accepted bidder, and the completion of his purchase depends upon the discretion of the Chancellor." The confirmation of the sale is a final judgment, subject to appeal between the parties to the suit on the one side and the purchaser on the other, and until vacated or reversed is obligatory on both. Hence the purchaser, after confirmation, can not object to pay his sale bonds when he finds a flaw in the title to the lands bought.² It is different where

³⁸ Gen. Stat., 44, Art. I, Sec. 8; *Scobee v. Bridges*, 87 Ky. 427.

¹ *Stump v. Martin*, 9 Bush, 285, 289.

² *Megowan v. Pennebaker*, 3 Metc. 501, where dower was outstanding, refers to *Todd v. Doud's heirs*, 1 Metc. 281. Same as to arrears of

taxes, *Farmers' Bank of Kentucky v. Peters*, 13 Bush, 591; these fall on the purchaser, though he might, if the arrears were heavy, before confirmation, be excused from the bid. But since the Code of 1876 the purchaser in the Louisville Chancery (or L. and E.) Court has, by Sec. 778,

the sale is made under a void judgment: it is then void. Under a valid judgment lands might be sold, in which the parties have no title, and of which the court *can not give possession*, but which it professes to sell absolutely. Whether a purchaser of such lands could after confirmation be relieved has not come up; the failure of title alone is not enough to relieve him; the principle *caveat emptor* must be upheld.³

Where land is sold by the acre and turns out to be much more or much less than the quantity paid for, relief in equity will be given to the parties against the confirmed purchaser, or to him against them, in like manner as if the sale had been private. An excess of the commissioner in selling for more than is required is not as fatal as a like excess in an execution sale. If excepted to, the sale will be set aside; but if for want of exceptions, or through error of the court the report has been confirmed, then there is a final judgment, which after the term can only be set aside by appeal or suit to vacate.^{3a}

As a rule a purchaser is not affected by the subsequent reversal of the decree of sale. But the courts of some States, perhaps under local statutes, have laid down a different rule, where the plaintiff, who has notice of the error in his own decree, purchases, and compel him to restore the thing purchased

the right to have all taxes and assessments paid out of the purchase money. In *Megowan v. Way*, 1 Metc. 418, at page 421 is a remark as if the court guaranteed a title; but probably the sale had not been confirmed when the objection was raised.

³ *Preston v. Breckinridge*, 86 Ky. 619. In one case it was held that the plaintiff by stirring the point justified the purchaser in raising the question of title; *Humphreys ex'r v. Wade*, 84 Ky. 391; *Williams v. Glenn's adm'r*, 87 Ky. 87, *Dictum* (p. 91), that the purchaser may sue the debtor in the decree whose debt he paid without consideration.

^{3a} *Dawson v. Litsey*, 10 Bush, 410, apparently overruling *Blakey v.*

Abert, 1 Dana, 185—in which a commissioner's sale of too much land is called void—but which was decided on writ of error to the order of confirmation, and *Gathright v. Hagard*, 17 B. M. 561, a direct proceeding to vacate the judgment of confirmation. The Code of 1854, Sec. 812, allows the sale of an excess in certain cases, under decrees of the Louisville Chancery Court, and the Code of 1876, in Sec. 694, applicable to all the State, lets the court adjudging a sale determine whether or not the tract can be divided without materially impairing its value; and if this can not be done, the whole tract must be sold and the surplus be turned over to the owner.

upon a reversal. The Kentucky Court of Appeals, when the land of the supposed debtor is sold, disallows this distinction.⁴ Where the reversal is on the question of debt and the ownership of the thing sold is not at issue, the case is analogous to that of an execution sale under a reversible judgment at law, and plain enough. But where lands claimed by B are sold for A's debt under a decree, afterward reversed at B's instance, the question, whether the sale, though confirmed, shall stand, is rather close. It arose in 1867,⁵ where the wife's lands were ordered to be sold for the husband's debt, as being held in fraud of creditors: the plaintiffs having bid in some of the lands, transferred their bid to a stranger: other lands were bought by another stranger. The court criticised the older cases in which the purchase by a party is deemed as good as one made by an outsider; it laid hold of the fact that a bid came through the plaintiffs, and that when the appeal was taken the purchasers had not paid the whole price nor received a deed. Upon a petition for rehearing the court (Williams, J.) yielded so far as to give the purchasers a first lien for the amount paid by them, before appeal taken, subject to an account for rents, taxes, and improvements. In the old case (1827) here criticised, the original suit was one to sell a tract in which the appellant was interested, to satisfy appellee's claim arising under appellant's interest, while the purchasers were other defendants in that suit, also interested in the land. They were allowed to hold it, though on error to the decree of sale, appellee's claim had been thrown out. At last, in 1888,^{5a}

⁴ Parker's heirs v. Anderson's heirs, 5 Mon. 445 (1827—purchase by co-defendant), Yocum v. Foreman, 14 Bush, 494 (1879), and intermediate cases quoted in the latter. Gossum v. Donaldson, 18 B. M. 230, 237, is very pointed. A sale will not be disturbed though made after appeal prayed, and before supersedeas. (Bank of Ky. v. Vanmeter, 10 B. M. 63.)

⁵ Hall and wife v. Miller, 1 Bush, 229; *contra*, Whiting v. Bank of the U. S., 13 Pet. 6, on appeal from U. S. C. C. for Ky. In Campbell v. John-

ston, 4 Dana, 185, the appellant had superseded before the commissioner made a deed to the purchaser; whether the sale had been confirmed is not clear from the report. Debell v. Foxworthy's heirs, 9 B. M. 228, is not in point; the vacated decree was not for a sale, but for conveyance.

^{5a} Baker v. Baker, 87 Ky. 461 (Hall v. Miller not quoted). In a suit for damages for causing the erroneous sale, the value at the time of sale with interest is the measure of recovery. (Hays v. Griffith, 85 Ky. 385.)

the Court of Appeals laid down the distinction, that where the lands sold belong to a person other than the debtor (for instance, a voluntary grantee who can not hold against a previous creditor), and the decree of sale under which the plaintiff has purchased is reversed, his title fails. The judgment confirming the sale is void, if before its entry either the former owner or the purchaser dies. In such case the proceedings should be regularly revived.⁶

The Louisville charter of 1851 gave to the holders of apportionment warrants a lien on abutting lots, enforcible in equity, and required the court "confirming the sale" to give three years in which to redeem, by payment of the bid with ten per cent interest and all taxes and assessments. It was held that lapse of time before the confirmation is not to be considered, but the confirming order is erroneous unless it allows three years thereafter, and that the redeeming owner need not pay taxes and assessments paid before the confirmation.⁷

A judgment of confirmation may be vacated for "inevitable misfortune preventing a defense" and kindred grounds given in Section 521 of the Code of 1876 (Section 579 in 1854), and in such proceeding the error in the judgment for a sale will have some weight.⁸

Great inadequacy (such as a bid of \$73 for a lot worth \$1,200) with slight circumstances of fraud or accident will justify the Chancellor to set aside a confirmed sale, though insufficient by itself.⁹

Where the successful bidder at a decretal sale prevents others from competing by giving out that he is buying the land for the benefit and protection of the owner, equity will hold him as a trustee, and will allow the owner to redeem.¹⁰

⁶ Fox v. Barbee, 79 Ky. 588, 593 (owner dead); Gill v. Hewett, 7 Bush, 10 (by analogy; purchaser died before order for deed—deed bad). The rule of Cumber v. Wane (Sm. L. C.), that a judgment may be entered *nunc pro tunc*, where defendant dies after a *curia advisare vult*, is unknown in Kentucky.

⁷ Fox v. Barbee, *Ibid.* 594, 598.

⁸ Yowell v. Gaines, 2 Bu., 211, 214.

⁹ Bean v. Haffendorfer, 84 Ky. 686.

¹⁰ Crutcher v. Hord, 4 Bush, 866. See also Miller v. Antle, 2 Bush, 408; Green v. Ball, 4 Bush, 591. An *implied trust* is raised in favor of the original owner, and the Statute of Frauds does not apply.

The facts should be made out pretty clearly. But it was said that acts are louder than words; and where the purchaser, having bid a very disproportionate price, allows the original owner to remain in possession for a long time, and to erect improvements, and there seemed to be a purpose that he should take the title only for his indemnity (though he really kept no one from bidding), the owner will be given an opportunity to redeem upon the payment of all costs.¹¹

Where a trustee has the power, and is in duty bound to sell at the request of a party in interest so as to cut off the title of all others, the sale by the court, in a suit brought against him to compel a sale, and a commissioner's deed thereunder are equivalent to a deed by the trustee, and will bar all the beneficiaries under the trust.¹²

It is irregular for the commissioner of the court, who is to sell, to let an auctioneer cry off the land in his absence, and such a sale would be set aside upon exception; but when confirmed it seems that it would pass the title, though this is drawn into doubt by the language of the Court of Appeals.¹³

Under the act of April 9, 1878,¹⁴ lands ordered to be sold by the judgment of a court must be valued "by two disinterested intelligent housekeepers," and, unless the bid reaches two thirds of the valuation, the sale is for one year subject to be redeemed, with interest at the rate of ten per cent per annum, and the possession remains meanwhile with the former owner.

This law applies to sales for debt only (including sales to wind up an insolvent assignment),¹⁵ not to sales for division, maintenance, or reinvestment,¹⁶ and, on constitutional grounds, it does not affect sales to enforce demands arising by contract before the passage of the act.¹⁷ An attorney of record for the debtor can not, as such, waive the right to redeem.¹⁸

¹¹ Fishback v. Green, 87 Ky. 107.

¹² Walker v. Smyser's exr's, 80 Ky. 620.

¹³ Noland v. Noland's adm'r, 12 Bush, 427 (last line but one, "leaves the purchaser without title.")

¹⁴ B. and F. Gen. Stat., 835.

¹⁵ Graves & Wells v. Long, 87 Ky. 441.

¹⁶ Wooldridge v. Jacob, 79 Ky. 250.

¹⁷ Collins v. Collins, 79 Ky. 88.

¹⁸ Graves & Wells v. Long, 87 Ky. 441.

SEC. 73. COMMISSIONERS' AND SHERIFFS' DEEDS. A Virginia act of 1776,¹ which confers the legal title on those who hold under a sheriff's or commissioner's deed in pursuance to a judgment or decree is retrospective only. An act of 1785 (in force in 1787) authorized guardians and commissioners to execute deeds upon decrees for title against infants and persons of unsound mind.² A Kentucky act of 1795 allowed the County Court, upon request of the personal representative of one who had sold land within its county by executory contract, to appoint "three fit persons guardians" of the infant heirs with powers to execute deeds as contracted for.³ Such action was thought to be almost ministerial, and unless closely following the law, invalid, while where a superior court of equity ordered a commissioner's deed prematurely it was barely error.⁴ An act of December 16, 1802,⁵ enlarging that of 1795, enables the commissioners to convey the shares of the adults as well as of the minors. Lastly, the act of February 16, 1808,⁶ in general words enables a court of equity to order deeds to be made in pursuance of its decrees, either when the defendant fails to comply with the mandate of the court or is absent or a non-resident. It seems that commissioners' deeds, which were constantly made to purchasers at decretal sales, were thought good under the act of 1776, by giving it a prospective meaning by implication.⁷

Until May 31, 1865, a judgment for a conveyance had to be revived, if before completion of the deed either owner or purchaser died. An act of that day⁸ gave force to a deed made in pursuance of the judgment, even though such death intervened; the deed must ignore such death. An order con-

¹ M. and B. Stat., I, 454; Sections 7 and 8 of Act; Litt. Laws Ky., IV, 434.

² M. and B. Stat., I, 455; Litt. Laws Ky., I, 673. As to early acts on commissioners to divide land, see Section 79.

³ M. and B. Stat., I, 455; Litt. Laws Ky., I, 279.

⁴ Nesbitt v. Gregory, 7 J. J. Mar.

271.

⁵ M. and B. Stat., I, 457; Litt. Laws Ky., III, 18.

⁶ M. and B. Stat., I, 458; Litt. Laws Ky., III, 460.

⁷ Morehead and Brown print Sections 7 and 8 of the Act of 1776, as to commissioners' deeds, as being then (1834) in force.

⁸ Myers' Suppl., p. 113.

firming a sale, but not directing a deed in so many words, is not aided by this statute.⁹

A purchaser without deed, or plaintiff having a decree for conveyance, can transfer his confirmed bid or decree by a mere writing or order of court, and thus cut off his wife's dower. The commissioner's deed (see Code, Section 398—old Code, Section 438) is of no force until approved by the court (even where a trustee is directed to convey what he could not convey without such direction), but is not invalid when the commissioner, like a sheriff, draws and executes it in his own name, of course referring to the judgment.

The custom in the country (and such was the requirement of some statutes) is not to have a commissioner's deed till the whole purchase-money is paid; at Louisville it is usual (and the law authorizes it everywhere) to have a commissioner's deed at once after confirmation, with a reservation of lien. When this is done the lien can only be enforced by a regular suit,¹⁰ though the purchaser may be forced (as long as he has not parted with his purchase) by rule and attachment to surrender it or any other property to be re-sold for cash. In a case of doubtful authority already quoted, it was thought that a purchaser before deed was given stood in a somewhat weaker position than he would otherwise.¹¹ The right of possession of a purchaser at a judicial sale or other party entitled to a commissioner's deed does not depend upon the deed being made; with a purchaser under execution it does depend on the sheriff's deed.¹²

Neither a commissioner's nor a sheriff's deed proves more than its own existence—the last step in conferring the title at law. The record, or the *judgment*,¹³ execution and return must be produced.

⁹ Gill v. Hewitt, 7 Bush, 10, 15.

—Nesbitt v. Gregory, 7 J. J. Mar. 271; Boyce v. Pritchett, 6 Dana, 233. Deeds made since the Code (see Sec. 439 of old, Sec. 399 of new Code) run in the name of "the parties by A. B., Commissioner, etc.," and are signed by the latter without adding the

names of the parties at the bottom.

¹⁰ Nathan v. Jones, MS. Op., 1876.

¹¹ Hall v. Miller, 1 Bush, 229.

¹² Gen. Stat., Chap. 38, Art. 12.

¹³ Smith v. Moreman, 1 Mon. 154. Plaintiff deriving title from patentee through sheriff's deed non-suited for not producing judgment. Replevy

The sheriff's deed is good if even in an informal way it identifies the execution on which it rests.¹⁴ It must also identify the land sold, and, in doing so, it ought to follow the levy (made while the execution was alive), for from this all the power of the sheriff to sell and to convey is derived. Some of the older cases use very loose language about the description in the levy, and would even admit other evidence to show what was sold, on the ground that the sale being once made the purchaser's right can not be affected by the defective description afterward returned.¹⁵ The language of such an opinion was quoted in 1877, but the court there said, on the facts then before them, that the levy was "sufficiently descriptive."¹⁶ While now the sheriff's deed can be made only after the time to redeem, when there is a redemption, has expired, it was different under the execution law of 1828.

The sheriff's deed may be made either by the sheriff himself or by the deputy who acted in selling, though either of these be out of office, or by the succeeding sheriff. (In the latter case a former statute required a certificate to be exhibited by the old to the new sheriff that the purchase-money was paid, but this fact would be presumed from the making of the deed.) The rule was formerly one of construction, but is now written in the statute.¹⁷ Of course, where the coroner, or Marshal of the Louisville Chancery Court, etc., sells, such officer ought to execute the deed. And the sheriff (or his successor) may convey after the death of the execution debtor.¹⁸

A commissioner's deed, made in pursuance of a decree or judgment other than one confirming a sale, falls to the ground

or other bond having effect of judgment (see Gen. Stat., Chap. 38, Art. 11) enough, without going to judgment behind it. (*Locke v. Coleman*, 4 Mon. 815, 819.)

¹⁴ *McGuire v. Kouns*, 7 Mon. 387.

¹⁵ *Reed v. Heasley*, 9 Dana, 325. Recitals in deed not best evidence of orders in court. (*Short v. Clay*, 1 Mar. 371.)

¹⁶ *Bell v. Weatherford*, 12 Bush,

506. Here the number of acres was given, the county in which, the water-course whereon, and a reference to the deeds under which defendant held.

¹⁷ *Winslow v. Austin*, 5 J. J. Mar. 410; *Phillips v. Jamison*, 14 B. M. 583; Gen. Stat., Chap. 38, Art. 11, Sec. 8.

¹⁸ *Thomas' adm'r v. Thomas, etc.*, 87 Ky. 343.

with its reversal; not only the grantee, but those claiming under him, must take notice of the error, and their title comes to an end.¹⁹

SEC. 74. INFANTS' LANDS, ETC., BEFORE 1852. A court will sell the lands of infants and of other persons under disability when they are heirs to the debtor, or become terre-tenants after the encumbrance, and such sales have to be judged by those general rules that apply to all judicial sales.¹ But there have also been from time to time a number of statutes under which the lands of infants and other wards of the Commonwealth have been sold for one or more of the following purposes :

1. To pay off debts and encumbrances, not at the suit of any one creditor, but of the guardian or other representative of the owner's interest.

2. For the maintenance or support of the owner.

3. For the purpose of division of the proceeds among joint owners.

4. For reinvestment; and this particularly as to lands held in strict settlement, with remainders over, whether vested or contingent.

Before the adoption of the new Constitution the legislature often passed a private act to meet the case of some one infant or family of infants, and the constitutionality of those acts was sustained, first where the administrator or a commissioner was authorized to sell for payment of the ancestor's debts,² and again where the sale was ordered for reinvestment, even in lands outside of the State.³

A section of the act on descents of 1790,⁴ which has been re-enacted in the Revised Statutes, etc., authorizes a chancery court to sell descended lands where any one of the heirs is an infant, of unsound mind, a married woman, or resides out of

¹⁹ *Madeira v. Hopkins*, 12 B.M. 595.

¹ So held as to Sec. 20 of act of 1796 for selling descended lands for ancestor's debts. (*M. and B. Stat.* 565, in *Waring's heirs v. Reynolds*, 3 B. M. 59.)

² *Kibby v. Chitwood's heirs*, 4 Mon.

95; *Shehan's heirs v. Barnett's heirs*, 6 Mon. 595.

³ *Nelson's heirs v. Lee*, 10 B. M. 495, 507.

⁴ *M. and B.*, I, 290. The expression "beyond sea" in the old act means absent from the State.

the State, and where *each* share will amount to less than £30 (*i. e.*, \$100). The proceedings in such a case, it seems, are strictly judicial, and such as would be taken in a suit for partition. The act is often referred to, but the only case construing it is a MS. opinion under the corresponding article in the Revised Statutes, to the effect that it does not apply to *devised* lands.⁵ An act was, however, passed in 1813,⁶ by which the Circuit Court is empowered on the petition of the guardian, sworn to and showing that the sale would redound to the interest of the infant owner, to order the sale of such lands of infants as they hold by descent, other parties interested in the land to be summoned, who may give or withhold their assent to the sale of their own shares. Certain reports of commissioners are to be made in the proceeding, and the guardian is to give bond before the sale is ordered. It was held under this act:

1. That the proceeding is void if not instituted by the guardian,⁷ but that the father as natural guardian may file the petition;⁸ that the style of the petition: "A., infant, by B., guardian," is good enough;⁹ that the guardian joining as co-petitioner with the infant, and not stating his character in the petition, will keep the decree from being void, if he afterward gives bond as guardian,¹⁰ and that if he dies after the sale, though before collection and disposal of proceeds, the title is not affected by the want of a guardian.¹¹

2. That the court has no jurisdiction if the lands are not descended, but held by purchase or devise; but if the petition is silent, the holding by descent may be, in collateral proceedings, shown to sustain the sale.¹²

3. That the court has no jurisdiction to sell the whole land

⁵ Wyatt's devisees v. Wyatt's dev's, MS. Op., January, 1856, quoted Stan. R. S., I, 803.

⁶ M. and B. Stat., II, 806; Litt. L. Ky., V, 57.

⁷ Vowles' heirs v. Buckman, 6 Dana, 466.

⁸ McKee's heirs v. Hann, 9 Dana, 533, 536.

⁹ Richardson v. Parrott's heirs, 7 B. M. 382. An adult joint owner, instead of answering after summons, may join in the petition.

¹⁰ Lampton v. Usher's heirs, 7 B.M. 58, 63.

¹¹ Harrison v. Hord, 12 B. M. 474.

¹² Singleton v. Cogar, 7 Dana, 479.

including the interest of any one who does not consent in person or by guardian, unless it be under the act of 1790, each share being under £30.¹³

4. That the proceeding is not void because the guardian did not swear to the petition.¹⁴

5. Nor for want of a bond.¹⁵

The sale need not be made at auction; if made by the guardian under a decree of the court it is valid.¹⁶

The acquiescence of the infants when coming of age, especially their drawing the proceeds of sale, will cure otherwise fatal defects.¹⁷

Before 1852 the courts did not take jurisdiction to sell the estate of a lunatic or idiot, except as they would deal with the property of a person of sound mind.¹⁸ There was an act of December 13, 1831,¹⁹ under which a Circuit Court might authorize the committee of a lunatic or idiot (who has no family) to sell his lands for maintenance and support, and to execute deeds in the idiot's or lunatic's name; but no cases under this act have been reported, and it is not likely that much use was made of the law.

SEC. 75. INFANTS' LANDS, ETC.—1852 TO 1876. The Constitution of 1850 having forbidden the legislature to pass any special act to sell the lands of persons under disability, ordering it to confer the needed power on the courts, it became the duty of those drafting the Revised Statutes to draw up a more comprehensive law than that of 1813. The eighty-sixth chapter of the Revised Statutes was the result. The first article re-enacts the provisions of the act of 1790 as to sale of descended lands, writing \$100 instead of £30.¹ The second article provides for selling the lands of infants, idiots, and lunatics, though the latter words are also omitted where they should seemingly have been repeated. The land need not have

¹³ Peyton's heirs v. Alcorn, 7 J. J. p. 473.
Mar. 502.

¹⁴ Gates v. Kennedy, 8 B. M. 169.

¹⁵ *Dubitando*, McKee's heirs v. McKee, 9 Dana, 533, 537; Owens v. Cowan's heirs, 7 B. M. 152, 157.

¹⁶ Irvin v. Walker, 8 Ky. L. Rep.,

¹⁷ Harrison v. Hord, *ubi supra*.

¹⁸ Berry v. Rogers, 2 B. M. 308.

¹⁹ M. and B. Stat., II, p. 801; Sess. Acts, p. 109.

¹ See Sec. 74, notes 4 and 5.

come by descent, but any real estate held in possession, reversion, or remainder, and held by devise or *contract* comes under the workings of the statute, but a sale can not be made in contravention of the deed or will under which the lands are held, though it may be ordered "variant from the provisions of a deed of trust" defining the mode of selling. The petition must be filed by the *statutory* guardian (the law already allowed the appointment of a guardian in the father's lifetime) or committee, allege his belief as to the benefit to arise, be sworn to, and be accompanied by the title papers; the wife and children of a lunatic are to be made parties;² also all persons interested in the land, and the guardians of those who are infants. Article II, Section 2, provides: "Before the court has jurisdiction to decree a sale of infants' lands":

1. Three commissioners shall be appointed to report, and must report under oath, the *net* value of the infant's real and personal estate, the annual profits, and whether the interest of the infant *or idiot* requires the sale to be made.

2. Proof *may* be taken or required as to expediency, etc., of sale, etc.

3. "The guardian of each infant and committee of each lunatic, etc., whether petitioner or defendant, must enter into covenant to the infant, etc., with good surety, stipulating a faithful discharge of all duties under this act, and under any order or decree, etc."

If no such covenant be given, the interest shall not be sold, and the decree, sale, or conveyance thereunder shall be void. Under Article VI a deed is to be made to the purchaser after all the purchase money is paid; all sales are to take place at the court-house, unless otherwise ordered, and at all events at auction.

It was held under this law:

1. Though the infant's estate was held under a trust, and might, but for the statute, have been sold under the equity

² This seems so far jurisdictional that they would not be barred by the sale, if not made parties; perhaps, for want of service on wife and chil-

dren the decree would be void, as the service on them takes the place of service on the lunatic.

powers of the court, it could now be sold only in conformity with these provisions.³

2. If the proceedings purport to follow Chapter 86, they must conform strictly, even where the land to be sold is a town lot, held by infants and others jointly, which might have been sold under Section 543 of the Code of 1854 (see *infra*).⁴

3. That a decree ordering more lands of infants to be sold than necessary to pay the debts of the ancestor, for their supposed benefit, but not pursuing the rules of Chapter 86, is void.⁵

4. That the report is fatally defective if not sworn to, or if it omit, on its face, a part of the infant's estate in the valuation, or does not state that their interest requires a sale.⁶ But in a late unreported case, where the infants after many years tried to recover the land by reason of such a defect, the court receded, trying to distinguish between the complaint of the purchaser and that of the original owner.⁷

5. Each of several infant owners, whether plaintiff or defendant, even if he be constructively summoned, must be represented by a guardian, consenting in a petition or answer to the sale of his ward's share, and giving the "covenant" to him.⁸ But it was held lately that the infants need not be parties to the proceeding.⁹

6. That the "covenant" must contain all the prescribed terms, and must be given before decree; a clause appended to the latter, that it shall not take effect till bond is given, will not aid it.¹⁰

³ Barret v. Churchill, 18 B. M. 387.

⁴ Barbee's adm'r v. Hopewell, 1 Metc. 260.

⁵ Gill v. Givin, 4 Metc. 197.

⁶ Carpenter & Grigsby v. Strother's heirs, 16 B. M. 289 (1855—the first case); Wyatt v. Mansfield's heirs, 18 B. M. 781; Wells v. Cowherd, 2 Metc. 514; Woodcock v. Bowman, 4 Metc. 40; Watts v. Pond, 4 Metc. 61.

⁷ Furnish v. Austin, 9 Ky. Law Rep. 882.

⁸ Barbee's adm'r v. Hopewell &

Wyatt v. Mansfield's heirs, *ubi supra*. It seems the shares of the infants that were represented, and to whom bonds were given, would pass.

⁹ Dillingham v. Spalding, 8 Ky. Law Rep. 370.

¹⁰ Megowan v. Way, 1 Metc. 418; but where the bond is approved by the judge's indorsement, its being omitted in the order of court is not fatal, as the record is amendable. Higdon v. Lancaster, 7 Ky. L. Rep. 296.

7. A contingent remainder may be sold under this chapter.¹¹

Lest purchasers at sales made under this act should all throw up their purchases, two temporary acts were passed in 1861 and 1862, continued in 1864, renewed and made permanent in 1866,¹² which authorized the guardian to bring a sort of suit in equity to ratify the public sale, upon the ground that it was for the benefit of the infant to do so. We have already shown that not only these acts, but another act, which authorized the purchaser to sue for a ratification, were held constitutional.¹³

The fifth article of Chapter 86 deals with the sale of the lands, or any interest in lands, of married women. As the chapter on Conveyances allows such persons to convey these freely with the consent of their husbands, the provisions of this article were in practice confined to separate estates, which, under Article IV, Section 17, of the chapter "Husband and Wife" (47), were withdrawn from free disposition.

A decree to sell a married woman's estate can be rendered on the petition of her husband or next friend, she being made a defendant, and the husband also, if he is not the petitioner. She must by answer, acknowledged on privy examination by the court or its commissioner give her consent; her interest in land held jointly may be laid off and sold separately, or the whole may be sold with the consent of the joint owners. A "covenant" with good surety must be given, as in case of infants before decree, otherwise the decree sale and conveyance thereunder shall be void.¹⁴ It should seem that any other defect (for instance, the want of a privy examination) would not avoid the decree, provided the husband and wife are before the court as parties.

A separate estate has sometimes been gotten out of the way by a suit between husband and wife, the latter admitting that such estate has been created by mistake; and, where a decree

¹¹ Nutter v. Russell, 3 Metc. 168.

¹² Meyers' Suppl., pp. 424, 425, 426, 750, 752. Under the last act the purchaser must allege that the sale was fairly made and at a reasonable price,

that it was confirmed and the price paid, and that it was at the time beneficial to the infant.

¹³ See *supra*, Sec. 9, notes 4 and 5.

¹⁴ Ch. 86, Art. V, Sec. 1, sub. 7.

was thus obtained, turning the separate into a general estate on such ground, she was held estopped from questioning it.¹⁵

The Revised Statutes also allow the guardian to obtain from the equity court of his county an order to sell his ward's lands for want of other means for paying the debts of the ancestor.¹⁶ As no mode of procedure is named, a regular suit in equity, with process on the infant, must be understood. No cases are reported on the workings of this law.

The Code of 1854 interferes but little with the workings of the eighty-sixth chapter. It adds a valuable provision, in its Section 543, for selling town lots or improved lands, the improvements of which exceed the soil in value, and "which can not be divided without materially dividing the value," in order to divide the proceeds among joint owners, some of whom are infants or of unsound mind. The procedure is by equitable action, and the decree rests on the general jurisdiction of the court, and is not rendered void by defects in the steps preceding it, nor by neglect to provide therein, as Section 543 demands, that the share of an infant shall remain a lien on the land in the hands of the purchaser till a statutory guardian appears for the infant and executes bond (covenant) as under Chapter 86 of the Revised Statutes, or until the infant comes of age.¹⁷ The jurisdiction belongs to the equity court of the county in which the land lies, and the infants, not their guardians, must be parties.¹⁸ The dowress can not have a sale under Section 543 against the sole heir, an infant; such a decree and a sale under it are void.¹⁹

The Code of 1854 further aids or affects the validity of sales under "Chapter 86" in the following particulars:

1. A married woman of full age and of sound mind may request, upon privy examination, that no bond be given by her husband.

2. The lands of a person of unsound mind, incurable, and having a wife and children, the latter being parties and

¹⁵ Stone v. Werts, 3 Bush, 486.

¹⁶ Ch. 48, II, Sec. 5.

¹⁷ Todd v. Dowd's heirs, 1 Metc. 281; Robinson v. Redman, 2 Duv. 88.

¹⁸ Girty v. Logan, 6 Bush, 8. See *contra*, under Code of 1876, *infra*.

¹⁹ Liederkrantz Society v. Beck, 8 Bush, 597.

consenting in person or by guardian, may be sold by a court of equity if deemed of benefit to his estate, though not necessary for payment of debts or for his support.

3. And if held jointly with others, if it is found that the interest of the others would be advanced by the sale, and he not injured.

4. A sale of lands is to be deemed prohibited by the deed or will, only by express words to that effect.

5. Where lands of infants, etc., are held in trust, the petition is to be filed, and the bond to be given by the trustee instead of the guardian or committee.²⁰

The following amendatory acts may also affect the titles of purchasers :

1. An act of March 10, 1854,²¹ under which a court of equity may order any "land conveyed or devised to any woman, married or unmarried, or in trust for . . . a married woman, or for . . . an unmarried woman, to the exclusion of any husband, etc., with remainder over to her children, or to such of them as survive her, or their issue, etc.," to be sold "by the *trustee* or a commissioner" for reinvestment under its orders. All children or issue in being must be made parties. Nothing is said about the decree being void by cause of any defects. It was held that under this act, and a subsequent one enlarging it, no bond is required, as the court retains the fund and reinvests it.²²

2. An act of March 10, 1856²³ provides for selling the lands of idiots and lunatics, held jointly with others, in like manner as that which is held in severalty. The committee, if there is one, must be a party; if none, "the Chancellor." shall appoint a guardian *ad litem*, or next friend; bond shall be executed before sale is *made* (*sic*, not ordered); the act does

²⁰ C. P. '54, Secs. 540, 541, 542, 544, 545. These provisions have not given rise to any reported cases.

²¹ Stan. Rev. Stat., II, p. 812.

²² Griffith v. Burton, 8 Bush, 358; held within the act, though there was a further limitation over to the hus-

band for the want of issue; Terrell v. Spence, *Ibid.* 637, held within the act, being to the separate use of the wife for life, remainder to such persons as would be her heirs. (Paul v. Paul, 5 Bush, 483.)

²³ Stan. Rev. Stat., Vol. II.

not say by whom when there is no committee. The lunatic's interest may be ordered to be sold with that of the others.

3. An act of same date²⁴ directs, that in petitions as to sale of lands of non-resident infants who have no guardian in Kentucky, the foreign guardian and the parents, if living, shall be made parties.

4. An act of February 16, 1858,²⁵ extends that of March 10, 1854, to all cases where the remaindermen are the children, etc., of the first taker, whether the latter be a woman or not.

5. An act of February 28, 1860,²⁶ dispenses with commissioners, bond, etc., in sales for division where the shares are under \$100.

6. An act of August 23, 1862. By this act land held under a deed or will, which creates a contingent interest in favor of persons not yet determined, may, upon "proceedings" instituted in the equity court of the county by any party in interest, be sold, when it appears that the interest of all parties present and future will be subserved by it, and the purchaser will have a complete title. Unwilling part owners may insist on partition. The court itself must hold the proceeds and reinvest them, which ought to render a bond needless. When any vested interest is held by infants, married women, etc., the provisions of "Chapter 86" are to apply. It is not said in so many words, but would naturally follow, that all persons in being that have an interest must be made parties.²⁷

7. The act of February 15, 1886, extends Section 543 of the Code to cases where all of the part owners are *sui juris*, and to lands of any kind which can not be divided without materially impairing their value.²⁸ Unwilling adults may, however, insist on having their shares laid off in severalty.

8. An act of February 17, 1866, allows the sale of an infant's land also for the "maintenance of his or her family."²⁹

An act of 1872 undertakes to do for the law of 1862, touching the judicial sale of remainders, what has been done theretofore for the law regarding the sale of infants' estates;

²⁴ Stan. Rev. Stat., Vol. II, p. 818.

²⁵ *Ibid.* p. 814.

²⁶ Myers' Suppl., p. 422.

²⁷ *Ibid.* p. 751.

²⁸ *Ibid.* p. 751.

²⁹ *Ibid.* p. 751.

it allows any party to the old cause, in which a sale was had, to bring suit against all others for the purpose of curing defects and quieting the title.³⁰ The validity of the act has not, to our knowledge, been tested.

The provisions of the General Statutes (Articles 2, 3, 4, 5, 6 of Chapter 63) were in force only from December 1, 1873, to January 1, 1877. The existing law is re-enacted as to sales for division, where each share is under \$100. As to lands of infants, etc., generally, the law is changed in the following respects: The appointment and report of commissioners, and taking of proof, though directed, are no longer made a test of jurisdiction.³¹ A bond must be executed by each guardian or committee of either plaintiff or defendant, with *two* or more sureties³² worth at least double the estate, and approved by the court,³³ before it can order a sale; the share of any infant, etc., to whom no such bond is given, does not pass. Article III, providing for "sale of lands of infant married women," was substantially re-enacted in the Code of 1876 (see *infra*.) The existing law for selling lands which can not be divided, etc., is substantially re-enacted. Article VI directs: "Remainder and contingent interest"—which would include the possibility following a defeasible fee—"in real estate may be sold upon petition of any person having a present or vested interest, all persons in being having any interest, etc., being made parties to the action;" a sale under the judgment of a court, finding "that the interest of all concerned would be subserved," is to "invest the purchaser with the title of the present and future contingent claimants." *Quære*: How about future vested interests? But the act has been liberally construed.

The proceedings are to conform to "Article III," which treats of the land of infants, lunatics, etc., and would, beside the appointment and report of commissioners, embrace the execution of bonds; but it was held, as under preceding acts, that when the proceeds of sale must be paid into court, and

³⁰ Sess. Acts, '71-'72, p. 69.

See Sec. 76.

³¹ *Henning v. Harrison*, 18 Bush, 723.

³² The approval of the court is conclusive as to worth of sureties.

³³ Bond with one surety unavailing.

invested under its orders, a bond is both useless and needless.³⁴ Unwilling owners are entitled to partition in kind, unless where the land can not be divided without materially impairing its value. Where an adult married woman petitions for the sale, the only way to bar her interest effectually is for her and her husband to tender a private deed to the purchaser, acknowledged like ordinary deeds of married women.³⁵ The power to sell settled lands can not be given by a provision in a deed of trust; it must come from the statute.³⁶

NOTE.—The form of the bond to infants, lunatics, etc., is given in Article III, Section 8, and is from it copied almost literally into the Code of Practice of 1876. (See next section.)

SEC. 76. INFANTS' LANDS AND KINDRED SUBJECTS SINCE 1876. The Code of Practice of 1876, in Sections 489 to 498 inclusive, brings together all the law as to selling judicially the land of persons under disability, whether for debt or liens, for support or reinvestment, or for the purposes of division; and, incidentally, the sale under the judgment of a court of the fee in lands held by a tenant for life, with remainders or reversions standing out. The remedy is practically much broadened by Section 694 of the same Code (see Section 72 *supra*), which allows a court adjudging a sale to determine that the land can not be divided without materially impairing its value, and therefore to order it to be sold as a whole. Thus a valuable house and lot belonging to infants, or on which remainders are outstanding, might be sold at the suit of the city of Louisville under a judgment for arrears of tax, and the sum adjudged with costs being satisfied, the residue of the fund would remain subject to the control of the court for the benefit of the parties in interest.

While decrees under the act of 1813 were barely and reluctantly allowed to be judicial acts, and the Revised and General Statutes yet speak of "petitions," not suits or actions, the new

³⁴ Henning v. Harrison, *ubi supra*.

³⁵ *Ibid*.

³⁶ Walker v. Smyser's ex'r, 80 Ky. 620. In this and preceding cases it

is often asserted that the power to sell infants' lands or settled estates is wholly statutory, and not inherent to courts of equity.

Code knows of no way of arriving at a judgment for a sale, except an action to which there must be defendants as well as plaintiffs. After reciting (in Section 489) that the infant's land may be sold for his ancestor's or his own debt,¹ the Code proceeds to authorize sales:

1. In an action by a guardian against his ward for a sale, etc., for the maintenance and education of the infant. (A foreign guardian, authorized to act in this State by a County Court under the provisions of the General Statutes, Chapter 48, Article 2, Section 11, is competent for this purpose.^{1a})

2. In an action by a committee of a person of unsound mind against him for a sale, etc., for his maintenance or for the maintenance of himself and family, etc.

3. In an action against a person of unsound mind by his committee, or against an infant by his guardian, or, if the infant be a married woman, by her husband (if of age), if not, by her next friend, for a sale, etc., and reinvestment, etc.

The infant or *non compos* being made a defendant, there must a guardian *ad litem*, and if the infant be under fourteen such guardian *ad litem* must generally be served with process. (See *supra*, Section 69, amendment to Section 52 of the Code.) In other cases the omission to name a guardian or committee *ad litem*, or his failure to answer or defend, would only result in error, not in a void decree.

Section 490 re-enacts the law of 1796 of sale for division, where each share is less than \$100 in value, in its enlarged later form, and the substance of Section 543 of the old Code, thus: "If the estate be in possession and the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein." (Under this provision the infant, even by next friend, may be a plaintiff in the suit for sale and division.²)

¹ The Code omits to say for a lien debt created by a former owner, but can not be understood to deprive the lien-holder of his rights when the encumbered land falls upon an infant.

^{1a} *Shelby v. Harrison*, 8 Ky. Law Rep. 88.

² *Henning v. Barringer*, 10 Ky. Law Rep. 674. And if made a defendant in such a suit he need not be defendant to a cross-petition by his guardian asking for the reinvestment of his share. (*Phalan v. Lou. S. V. & T. Co.*, 10 Ky. Law Rep. 668.)

The old provision, that the share of an infant or *non compos* must remain a lien until he comes of age, etc., or bond is given by his guardian or committee, is put into a separate section (Section 497). A sale was sustained under this section, of land belonging jointly to a "woman and her children," including after born, the proceeds being held for reinvestment.³ The section on reversions and remainders (Section 491) must be copied entire :

"In an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee, if he be an infant or of unsound mind, against the owner of the reversion or remainder, *though* he be an infant or of unsound mind, and against the owner of the particular estate, if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, *though* he be an infant or of unsound mind, and against the owner of the particular estate, *if* he be an infant or of unsound mind—real property may be sold for investment of the proceeds in other real property."

As far as this section authorizes the sale of the remainder or reversion of an adult of sound mind against his will, it is unconstitutional.⁴ It is generally believed that a defeasible fee is not included in the words "particular estate," if for no other reason than that the interest following its termination is technically neither a remainder nor a reversion, but an "executory devise," or a possibility of reverter. In a suit by husband and wife against their children under this section, it appeared that though as to part of the lands the wife was life-tenant and the children remainder-men, as to another part she held the fee; as to the latter part the decree was void.⁵ When the directions of Section 491 are properly followed out the purchaser will have a good title as against unborn remainder-men.

³ Tylor v. Jewell, 10 Ky. Law. Rep. 887.

⁴ Gossam v. McFerran, 79 Ky. 236. (See *supra*, Sec. 16 n.)

⁵ Munnell v. Orear, 84 Ky. 452. The life-tenant may bid and purchase at the sale. (Blankenbaker v. Blankenbaker, 11 Ky. Law Rep. 595.)

Section 492 states the requirements for a judgment to sell either the lands of infants or of those of unsound mind, or lands fettered by reversions or remainders.

1. "No sale shall be ordered forbidden by the deed, will, etc." Though the statute is plain enough on its face, it has also been expressly held that this does not affect sales for division.⁶

(Clause 2 is not jurisdictional.)

3. "The wife and children, if any, of the person of unsound mind must be made defendants."

It seems that the omission to do so would allow such wife or child to assert title, if the estate should fall upon them. Whether such omissions would render the sale invalid against the person of unsound mind himself has not been decided, but it might be so held, as the notice to the wife and children stands in the place of process against the former.

4. Facts must be stated and proved, showing why the sale would be of benefit. It seems clear that any omission in this regard can only lead to an erroneous decree, if there be some general averment indicating the purpose of the action.

Section 493 provides for a bond, and is very precise:

"The guardian of each infant, the committee, etc., and the husband or next friend of each married woman must, before the sale is ordered, execute a bond to the infant, etc., with at least two sureties, worth, etc.;" in substance as follows: "We —, principal, and — *sureties*, bind ourselves to — that the said —, as guardian (or, etc.) will faithfully discharge all his duties as such, and will comply with the judgments and orders of the court in the action, and will account for, pay, and deliver to the said — all money or property due or belonging to him, when required."

The approval of the bond is to be indorsed upon it: "If bond be not given, any order of sale, and any sale or conveyance made under such order *shall be void*." It has been held that a bond with one surety only is no compliance, and the order based on it is void.⁷ An infant married woman must

⁶ Kean v. Tilford, 81 Ky. 600.

⁷ Barnett v. Bull, 81 Ky. 127. But certain chartered trust companies, when acting as guardian, need not

give security on this bond. (Phalan v. Lou. Safety Vault and Trust Co., 10 Kentucky Law Rep. 668; Johnson v. Johnson, 10 Ky. Law Rep. 860.)

also, before the order of sale, file an answer giving her consent and acknowledge it on privy examination. It seems that a failure herein is fatal. Among the remaining provisions of the chapter, the title of the purchaser is affected by the following (Section 494):

The sale must be made by a Commissioner of the Court;

The conveyance must be made by a commissioner and acknowledged by him, and approved by the court.

(In case of death before reinvestment, the fund is to be considered as converted into the kind of property in which it was to be invested.)

If objection be made by a joint owner to the sale of his share, his share shall not be sold. *Quære*: Does this apply to proceedings under Section 490?

"If a deed or will give to a trustee discretionary power to sell, etc., the court shall *have no power* to order a sale" without his consent.

Also (Section 495) a married woman's right of dower, vested or contingent, may, with her consent (and if she be of unsound mind, without it) be estimated in money value and paid to her out of the proceeds.⁸

Also (Section 495) no bond need be given, nor privy examination taken on sales for partition where the share is less than \$100.

On the 15th of April, 1882, an act was passed⁹ (perhaps borrowed from the British act of that year for the benefit of life-tenants, though far less drastic and extensive), relating only to estates held in trust by one person for the benefit of another person for life, with remainders to "a class" or to persons not to be ascertained until the life-tenant, or with power of devise in the life-tenant. The circuit or other equity court may, in an action to which all persons in interest are made parties, on proper averment and proof authorize the *trustee* to sell or mortgage the fee, the proceeds to be paid *into court* for reinvestment, his deed to bind all parties in interest, present and

⁸ See table of values of vested dower in front of 3 Bush; potential dower in *Lancaster v. Lancaster*, 78 Ky. 198.

⁹ See Carroll's Code, p. 241. Made general by act of April 24, 1882. See Sess. Acts, p. 128.

future. The bar has made but little use of this act; its very liberality will cause it to be very strictly construed. No cases under it are reported.

A late rather curious case, which must have been decided in like manner under each of the different statutes for the sale of infants' lands, should be mentioned. A father died intestate, leaving two infant children, and his wife *enceinte*. The guardian of the two children, by proceedings under the Revised Statutes, had the descended lands sold as the property of the two children, and the defendants acquired it at or under the decretal sale. A posthumous child was then born, and, coming of age, sued for one third of the land and recovered, as her title could not pass by the decree.¹⁰

SEC. 77. DIVISION AND DOWER. Partition and the allotment of dower by real action, or by suit in equity in the Circuit Court, are tested for their validity by the general rules governing judgments and decrees. But since 1792 cheaper and quicker methods of division and allotment have been provided through the County Court for certain classes of joint ownership. These methods, being unskillfully pursued and afterward closely scrutinized, oftenest turn out inoperative in law. The needs of the "locators" of land for eastern owners desirous to enjoy their reward, which was always a share in the entry or survey, gave rise to the earliest act (in force March 1, 1793).¹ Where some of the joint owners of land are non-residents, and others of them are residents of Kentucky, and the former fail to attend to make partition and do not appoint agents for that purpose within a year of that act, the County Court shall appoint six commissioners (it seems for all cases by a general order), any two of whom may divide lands upon application. Their doings are wholly *ex parte*; but part owners may within two years, if the division was unequal, have a re-division. The commissioners report their "division" to the County Court to be recorded, but they make no deed.

An act of December 20, 1794, extended the remedy to lands owned wholly by citizens, upon demand and refusal; it took

¹⁰ *Kalfus v. Crawford*, 82 Ky. 814
(heard with *Massie v. Hiatt's adm'r*).

¹ M. and B. Stat., II, 1066; Litt.
Laws of Ky., I, 123.

care of infants and *femes covert*, allowing them to apply for a re-division within a year after removal of disability.³

In an act of 1797, Section 2 provides for divisions with or among non-residents; Section 3 deals with lands "held in conjunction by citizens of this State, either as joint tenants, tenants in common, or by contract," leaving coparceners to their common law rights. The commissioners not only report their division, but execute deeds of partition. The County Court has nothing to do under these three acts but to order the "divisions" to record.³

These two sections are in the main re-enactments of the laws of 1792 and 1794, and one or the other must be followed distinctly. In one case a division purporting to be made with a non-resident owner was thrown out because his non-residence was not proved.⁴ The bond or other contract under which the share is claimed must be shown; if there was none, the commissioner has no jurisdiction.⁵ And between citizens of the State they have none, until there has been a demand to make partition, and a refusal.⁶

An act of 1811 (in force till 1854)⁷ deals with land descended from a common ancestor and held in coparcenary, whether free from or subject to the widow's dower.

The County Court of the decedent's residence, or of the county in which the descended land or a part thereof lies, is to appoint three commissioners on the application of the widow or an heir. The proceeding is judicial; the report is liable to exceptions, on which the County Court passes, but the division when confirmed may still be reviewed by a court of equity. The first application can not be granted unless an affidavit is produced, showing that written notice has been given to all parties in interest. The act of 1797 is left in force as to non-residents only.

³ M. and B., II, 1067; Litt. Laws Ky., I, 255. Mar. 361.

³ M. and B., II, 1068; Litt. Laws Ky., I, 691.

⁴ Short v. Clay, 1 A. K. Mar. 37.

⁵ Clay v. Moseby's heirs, 1 A. K.

⁶ Guyton v. Shane, 7 Dana.

⁷ M. and B., II, 1070; Litt. Laws Ky., IV, 238. In force from passage, January 26, 1811.

A proceeding under this act can not be helped out by the act of 1792 or 1797, but must conform to the former throughout.⁸ Where one heir has conveyed his share to another, the holding in "coparcenary" is broken, and the law of 1811 no longer applies.⁹ As the statute calls for an affidavit of service, a sheriff's return is not available; the absence of the affidavit stamps the division as void.¹⁰ Nothing seems to be presumed in favor of the proceeding; all facts giving jurisdiction must appear.¹¹ Few divisions can have been good, unless by ratification or long possession. But the courts have liberally allowed "illegal" divisions to be cured by an acquiescence, shorter than the bar of limitations, where the parties had held actual possession of their respective allotments, and especially where costly improvements had been made on the faith of such a division.¹²

The Code of 1854 devotes a chapter of eleven sections (Section 546—Section 556) to "Division of land and allotment of dower in the County Court," which are substantially re-enacted in the Code of 1876 in Section 499, with its sixteen subsections, except that the latter allows such proceedings to be instituted either in the County or Circuit Court from the beginning, while the former only directs a transfer to the higher court when a contest has been raised. In the Codes all distinction between non-residents and citizens, and between coparcenary and other holdings is omitted; in place of the application there is a "petition," that is, a regular pleading, and those not joining in it are summoned to answer; defendants under disability are dealt with substantially as in civil actions; three commissioners are appointed to divide the lands (two may act); they report subject to exceptions and confirmation by the court; one commissioner is then appointed to execute deeds; an appeal lies from either County or Circuit

⁸ Hood v. Mathers, 2 A. K. Mar. 561.

⁹ Gaithers v. Brown, 7 B. M. 91.

¹⁰ Newby v. Perkins, 1 Dana, 440. General recital of notice given will not do. (Craig v. Barker, 4 Dana, 601.)

¹¹ Rico v. Rice, 10 B. M. 420. Di-

vision held void because record did not show that a party in interest made the application. (Williams' hr's v. Williams' hr's, 3 Litt. 40.)

¹² Parker's hr's v. Anderson's hr's, 5 Mon. 450; Guyton v. Shane, 7 Dana, 498.

Court to the Court of Appeals. The whole method is so much like a regular action or suit, that it would, probably, in case of irregularities, enjoy all presumptions in favor of jurisdiction, even if carried on in the County Court. No case of collateral attack on such proceeding under either Code is found. In fact, little use has been made of this statutory remedy, a suit in equity being considered much safer.

The jurisdiction of courts of equity over partition has been extended by an act of May 15, 1886.¹³ Where two or more persons hold land (or the beneficial interest therein) each for life, with remainder to his children, the court may, in a suit to which all persons in being having an interest are made parties, divide the land between the several families, so that the remainders will only attach to the allotments in severalty. A second section allows the court so to divide lands thus held, of which part lies in this State and the rest in another State or Territory, giving to the residents of Kentucky their full share out of the home lands, "securing by proper deeds and orders to the non-residents a release of the interest of residents" in the lands abroad. As a Kentucky court can hardly by its decree pass the title of unborn children to lands beyond the State boundary, this part of the new law will, it seems to us, prove ineffectual.

The inchoate dower right of an infant's or a lunatic's widow is not destroyed by a judicial sale under the laws referred to in Sections 74, 75, and 76. But a provision in the General Statutes, and an amendatory act of February 11, 1876, authorize the wife of an infant or lunatic to join in the commissioner's deed, and thus to release her dower; while the infant wife may be authorized by the court to join upon terms, or even without an equivalent; or the adult wife may, as a defendant, acknowledge her answer giving consent on privy examination, and, the decree being rendered thereon, the sale will bar her dower.¹⁴

On the other hand, a way has been contrived by act of

¹³ Carroll's Code, p. 245; Sess. Acts, 1885-1886 (Public), p. 120.

amendatory act, B. and F. Gen. Stat., p. 726.

¹⁴ Gen. Stat., Ch. 52, Art. II, Sec. 8;

March 14, 1878,¹⁵ to bar the inchoate dower of the wife if she is a confirmed lunatic. On the petition of her husband, she and her committee, if any, being made defendants, the "Chancery Court" of the county containing the land may adjudge a conveyance and sale of the inchoate right of dower, but only after a covenant with surety has been given by the husband "that she shall be paid the value of her right of dower," and a commissioner is appointed who may join with the husband in a deed or deeds to purchasers of the land. The meaning of the covenant and measure of liability have been passed upon lately; the covenant is payable to the committee as soon as a sale is accomplished, hence the value only of the inchoate dower is recoverable.¹⁶

NOTE.—The loss of dower on the sale of the land upon mortgages and liens will be discussed in a subsequent chapter.

SEC. 78. JURISDICTION OF MATTER AND PARTIES. The Circuit Court and the courts carved out of its jurisdiction have cognizance of all suits for the recovery of money and property, when the amount sued for exceeds \$50 in value, and, when land is to be recovered or subjected to lien, to suits for smaller values. When such a court renders a judgment for over fifty dollars, it can not be deemed void simply because the court ought not to have entertained the demand. Although for want of statutory authority the tax bills of a city could not be enforced by suit, a judgment awarding several hundred dollars of taxes to the city of Louisville was, though erroneous, held to be a valid judgment.¹

And the presumption of regularity is applied to these higher courts in proceedings purely statutory; *e. g.*, a petition by husband and wife to have the powers of a *feme sole* conferred upon the latter. Nothing appearing in the record to the contrary they will be presumed to be residents of the county, so as not to render the decree void.²

¹⁵ B. and F. Gen. Stat., p. 325.

¹⁶ Fichtner v. Fichtner's assignee, 10 Ky. Law Rep. 924. Prof. Bowditch's table of inchoate dower values

is adopted in 78 Ky. 198, and found in that volume.

¹ Johnson v. Louisv., 11 Bush, 527.

² Hart v. Grigsby, 14 Bush, 542.

In probate matters the County Court has a general, not a limited jurisdiction, and is entitled to a like presumption, and its orders or judgments need not recite the facts which give jurisdiction. Where an order of administration read thus: "This day, on motion of A. B., administration on the estate of C. D., deceased, is granted to him, etc.," leaving out the usual words "late of — county" after the decedent's name, and thus failing to show jurisdiction affirmatively, the order was held *prima facie* good, though it might be shown to be void by allegation and proof that the decedent's domicile was in another county;³ and this presumption in favor of the appointee of a County Court in Kentucky will hold good even against a personal representative who has qualified in another State.⁴

Which is the proper court to appoint or qualify the administrator or executor will be discussed in a section dealing with "Devolution on Executors and Administrators."

The appointment of an administrator, even of an administrator with the will annexed wielding the testamentary powers over land, can not be impeached for defects in the bond.⁵

Formerly, when strict foreclosure was allowable, it was deemed a personal remedy and transitory, and before the Code the seeking of a personal judgment for a mortgage debt was thought to make even a suit for a sale of the premises transitory;⁶ but the former remedy is abolished, the latter is made local by the Code.⁷ While in 1889 the Court of Appeals disclaimed cognizance of a suit to vacate a grant by the State of land south of Walker's line,⁸ it decreed in 1890 against a trustee to convey lands in Iowa to the parties beneficially interested.⁹

³ *Jacobs v. L. & N. R. R. Co.*, 10 Bush, 268; see *Singleton v. Cogar*, 7 Dana, 479; see Sec. 74. The jurisdiction of the County Court to divide land is not general; see Sec. 77.

⁴ *Masters v. Barker*, 87 Ky. 1.

⁵ *Peebles v. Watts*, 9 Dana, 102; *Mobberly v. Johnson's ex'r*, 78 Ky. 273, 276.

⁶ *Cauffman v. Sayres*, 2 B. M. 202.

⁷ C. P. (1876) Sec. 375 (old 404); Sec. 62 (old 93); *Webb v. Wright*, 1 Bush, 107.

⁸ See *supra*, Sec. 51; *Com'w'lth v. Bowman*, 10 Ky. Law Rep. 696.

⁹ *McQuerry v. Gilliland*, 11 Ky. Law Rep. 656.

But in many cases the court of one county can order the sale or division of lands lying in another. Mainly in suits for the settlement or distribution of decedent's estates, which, under Sections 65 and 66¹⁰ of the Code of Practice, must be brought in the county where the personal representative has qualified; and by analogy, suits to wind up a debtor's estate for an attempt to prefer a creditor (under General Statutes, Chapter 44, Article II), in the county in which the debtor is summoned;¹¹ actions for money, in which an attachment is obtained and sent into another county to be levied;¹² a suit to enforce a judgment, which, under Section 439 of the Code of Practice, is brought in the county of the judgment or wherever the defendant is found; lastly, where the same encumbrance covers land in several counties.

Even in simple suits for money the question is often very nice, whether the court of any given county can render judgment against a defendant who is summoned. Judgments have been reversed for being rendered in the court of the wrong county; and in one case (under the Code of 1854) a judgment was thus reversed as being "erroneous and void;"¹³ but in no reported case has a sale under a judgment been held void on such grounds, and probably none would be held void, unless in proceedings for the sale of infants' lands and similar cases. The question should be speedily settled under the new Code, which gives no appeal on a void judgment (only from

¹⁰ New Sec. 66 is Sec. 97 of 1854. Under it the court of decedent's last domicil was held to have power to divide the descended lands in another county (*Hanks v. Driskell*, 18 B. M. 255); and the same court under new Sec. 66 might sell tracts in several counties for indivisibility. (*Phalan v. Louisville S. V. & T. Co.*, 10 Ky. Law. Rep., p. 663.) See to the contrary, *Girty v. Logan*, 6 Bush, 8, where old Section 97 is said not to apply; but the action to sell for indivisibility is treated as being local to the land.

¹¹ *Fishback v. Green*, 87 Ky. 107. Suits under the law against preferences follow the law for winding up decedent's estates; one case must dispose of all the property. It is not shown in the report how the particular Circuit Court, not of the land nor of the debtor's residence, got hold of the case.

¹² C. P., Sec. 201 (old Sec. 226), Secs. 439, 441 (old Secs. 474, 476).

¹³ *Ruby v. Grace*, 2 Duvall, 540; judgment in Graves County upon service in Webster.

the refusal of the lower court to quash it); but it has not come up to our knowledge.

Some titles may depend on judgments of the late "General Court," first established in 1796 as a fiscal court, but clothed by acts of 1799 and 1802 with cognizance of "all controversies between non-residents, and between non-residents and the citizens of this State," and in land cases between citizens jurisdiction might be given by consent.¹⁴ These acts have been most narrowly construed; one might be not a non-resident and still not a citizen of Kentucky, and thus the court fell between two stools.¹⁵

¹⁴M. and B., I, 517; Litt. Laws Ky., I, 478, II, 309, III, 42. Two or more of the circuit judges were to meet at the capital and hold the court.

¹⁵Ormsby v. Lynch, Litt. Sel. Cas. 303, Sneed v. Noffsinger, 2 Litt. 81, Lexington Man'f'g Co. v. Dorr, 2 Litt. 256, Lindsey v. McClellan, 1 Bibb, 263, against the jurisdiction;

Banks v. Fowler, 3 Litt. 332, Turner v. O'Bannon, 2 J. J. Mar. 186, uphold it. Consent is given by trying case without objection. (Fowler v. Halbut, 3 Bibb, 384; Madison's heirs v. Wallace's ex'rs, 2 J. J. Mar. 584.) The refinements under these acts are the same as under the partition acts mentioned in Sec. 77.

CHAPTER XII.

DEFECTIVE TITLES.

SEC. 79. Unrecorded Deeds.

SEC. 80. Executory Contracts.

SEC. 81. Conveyance of Bad Title.

SEC. 82. Surplus and Deficit.

SEC. 83. Parol Contracts for Land.

SEC. 84. Occupying Claimants.

SECTION 79. UNRECORDED DEEDS. It having been shown in a former chapter what is necessary to constitute a lawfully recorded deed, it remains to be seen what effect a plainly unrecorded conveyance, or one ineffectually recorded, has as against the claims of purchasers and creditors. And it may be said at once, that the word "creditors" might as well be stricken from the statutes for recording deeds, and as against purchasers the English doctrine of notice is recognized almost to its fullest extent.

The former point was finally settled in 1874, in conformity with an almost unbroken line of precedents. We quote from a decision of Judge Lindsay, rendered in a case where the sheriff had received and levied executions upon land after a deed had been made by the defendant, but before its putting to record, and a contest arose between an execution creditor purchasing from the sheriff and the holder of the debtor's deed, which had been re-acknowledged and put to record before the sheriff sold, and of course before he had made his deed.

He says: "Section 9, Chapter 24, of the Revised Statutes provides that no deed conveying any title to or interest in land for a longer time than five years . . . shall be good against a purchaser for valuable consideration without notice *or any creditor*, unless the same be acknowledged . . . and

lodged for record in the proper office, etc. Section 15 . . . provides that deeds made by residents . . . to be good against a purchaser without notice *or any creditor*, 'except from the time the same shall be . . . lodged for record,' must be so lodged within eight months after the date. . . . Appellee failed to lodge his deed for record within eight months, and appellants insist that the . . . lodging of the same after the execution liens had been perfected . . . in nowise affects their title. . . . In the earlier cases it was held that a deed not lodged within the prescribed time was absolutely void as to any creditor. In *Morton v. Robards*, 4 Dana, 258, this construction of the statute was repudiated, the court holding that the legislature intended only to regulate legal conveyances and to leave untouched the equities of the parties, and that while the legal title of a party not lodging his deed for record within eight months from its date was not good, yet his equity was unimpeachable, etc.

"In *Hally v. Oldham*, 5 B. M. 233, the correctness of (this) doctrine was doubted. It was, however, conceded that if the execution creditor was himself the purchaser, then notice to him before his purchase of the existence of the unrecorded deed would deprive him of its fruits, and that a court of equity might compel him to relinquish any advantage, etc.

"Reconciling . . . the reported cases, we deduce the following views :

"1. A purchaser at an execution sale, who has no notice of a title-bond or deed that has not been recorded within the prescribed time, will be protected in his title even in a court of equity.

"2. A purchaser with notice will also be protected, in case the execution creditor acts in good faith and without notice. Under such circumstances the creditor has the right to sell, and the purchaser necessarily takes all the title that the creditor can require the sheriff to sell.

"3. That notice to the purchaser after his purchase does not affect him. He is by his purchase invested with an inchoate legal title, which he has a right to perfect by conveyance from the sheriff, and this right does not depend upon his being a

stranger, etc.; the execution creditor is as much entitled to protection as a stranger.

“4. That notice to the creditor at any time before he may purchase affects his conscience, and he may be compelled, in obedience to the equity evidenced by the bond or unrecorded deed, to transfer the legal title to the party, etc.”¹

The only privileges of the creditor are these: that the highest bid alone without conveyance gives a protection which can not be lost by a subsequent notice, and that the purchase refers back to the beginning of the execution, attachment or *pendente lite* lien. Where the bid is made at a judicial sale in an attachment or creditor's suit, it would seem that it is not a purchase before confirmation, and that a notice of the unrecorded deed after the bid, and before confirmation, would come in time.

Mortgagees are purchasers within the meaning of the recording laws, and in fact the class of purchasers against whom questions of priority are most often raised. The leading case² as to the kind of notice of an unrecorded conveyance or encumbrance that will “affect the conscience” of those claiming under a subsequent recorded deed was decided in 1863. It arose between the holders of “income bonds” expressing a pledge on their face, but not secured by any recorded deed, and subsequent third-mortgage bonds of a railroad. The court adopts the English and New York doctrine of equitable notice, as held by Kent in his Commentaries, and by V. C. Wigram in 1 Hare's Reports, and holds: (1) That there is no difference in the degree of notice between instruments fitted for recording (like absolute deeds and mortgages) and those unfitted for recording (say, title-bonds); (2) that knowledge of the existence of an outstanding instrument does not oblige one to seek it out and learn its contents; (3) that one knowing the contents can not excuse himself by want of knowledge of its legal effect;³ (4) one who buys a note or bond secured

¹ Low & Whitney v. Blinco, 10 Bush, 881. The same rule has been applied in Righter v. Forrester, 1 Bush, 278, to a mortgage. It was not recorded till after the levy of an execution, but before the sheriff's

sale, and was allowed to prevail over the estate of the purchaser.

² Willis v. Vallette, 4 Metc. 189.

³ Nor by claiming that he had forgotten it. (Hunt v. Clark, 6 Dana, 59.)

by mortgage in good faith is not affected by notice to the previous holder.

Another otherwise rather unsatisfactory case (1869) makes notice to the husband of a previous unrecorded deed notice to his wife;⁴ and the usual doctrine of equitable notice, actual or constructive, is followed out in many cases both of land and personal property, bank stock, etc.,⁵ though it has never in Kentucky been carried, and probably never would be carried to the extent of the English doctrine as laid down in *Le Neve v. Le Neve* (given in *White and Tudor's Leading Cases in Equity*), where the subsequent purchaser was held bound by the notice which his solicitor had of a previous unrecorded deed, obtained in a previous employment.

SEC. 80. EXECUTORY CONTRACTS. The Statute of Uses annexed the title and possession to what otherwise would have been a mere contract to convey. But a want was felt for an instrument not operating *in præsentia*; an executory contract, to be performed or broken thereafter, especially by the early settlers of Kentucky, most of whom dealt in vast tracts held by "entry" without survey or patent, and without security against "interferences." Hence the "title-bond," sometimes in form a mere contract to convey, sometimes a real bond with penalty and condition; but in either shape it conferred on the holder an equity in the land, nearly but not quite like an express trust in a deed or will. Such bonds might, under an act of 1798,¹ be assigned by writing, which was mostly done by indorsement; the assignee held the legal title to the bond, though not to the land.

These bonds are sometimes used in our days, but not very often; some of the principles applied to them are also applicable

⁴ It was intimated, but on the facts and pleadings not decided, that the subsequent buyer could be protected against the unrecorded deed to the extent of a sum which she had paid upon sale by title bond, itself unrecorded (*Bennett v. Fotherington*, 6 Bush, 196.) In *Faris v. Dunn*, 7 Bush, 276, it was rather intimated

than adjudged, that notice to one of several mortgagees interested in the same demand was notice to all.

⁵ *Bank of America v. McNeil*, 10 Bush, 54.

¹ M. and B., I, 150; *Litt. Laws Ky.*, II, 75; *Rev. Stat.*, Ch. 22, Sec. 6; *Gen. Stat.*, Ch. 22, Sec. 6.

to the memoranda made in trades for land, to bind the bargain while the title is examined and perfected and the deed drawn.

The obligation to convey always means: (1) A conveyance in fee with general warranty; (2) a perfect title,² which includes a release of dower, if the grantor have a wife; (3) ability to give possession. The vendee can insist on the vendor's warranty, and need not accept the deed of a stranger.³ And he can not be compelled to accept any but a perfect title.

Where the vendee pleads that the vendor has no title, the latter has the burden of proof, and must exhibit his title, either back to the Commonwealth or to a thirty years' possession in one claiming the fee, which is *prima facie* evidence of a title;⁴ but where vendee charges only defects, he ought to point them out.

The English doctrine that "time is not of the essence of the contract," has not only been recognized,⁵ but carried to the utmost limit.⁶ A suit at law by the vendee does not put an end to the contract, but a judgment for damages does. After that it is too late for the vendor to tender a deed.⁷ However, there may be such unreasonable delay on the vendor's part as

² Davis v. Dycus, 7 Bush, 4, relying on Bodley v. McChord, 4 J. J. Mar. 475.

³ Taylor v. Porter, 1 Dana, 422. The duty to give a warranty involves that of inserting the true consideration received by the obligor (vendor). (Sproule v. Winant, 7 Mon. 196.)

⁴ Vittitoe v. Jones, 6 J. J. Mar. 515, distinguished from French v. Howard, 3 Bibb, 301, in Davis v. Dycus, *supra*.

⁵ Woodson's adm'r v. Scott, 1 Dana, 471, where it is said that hardly any amount of delay of the purchaser will preclude him from the Chancellor's aid, and on the other hand the vendor's title need not be complete at the filing of the bill. See also Tapp v. Nock, 11 Ky. Law Reporter, 611, where a delay of sixty days,

during which the vendor perfected his title, was excused, though the vendee thereby lost the chance to sell at a profit.

⁶ See Buford's adm'r v. Guthrie, 14 Bush, 677 (the case for which Judge Elliott was killed), which was, however, the case of an executed sale, and could not have been decided otherwise than it was. But see Honore v. Hutchins, 8 Bush, 687, where the rule "once a mortgage always a mortgage" was extended to a speculative contract for land, in which the plaintiff-appellant was in default in making his cash contribution. But time is of the essence in an "option." (Stembridge v. Stembridge's adm'r, 87 Ky. 91.)

⁷ Taylor v. Porter, 1 Dana, 422.

will justify the vendee in abandoning the contract, but non-payment by the vendee in possession leaves the vendor no other choice or remedy than a lien suit for the unpaid installments, treating the vendee as if he had made a conveyance to him, and reserved a vendor's lien or taken a mortgage for the deferred payments. It is different, if the vendee by giving up the possession abandons the contract.⁸ Of course, if the vendor is guilty of fraud in title, quantity, or quality, the vendee can always demand a rescission.⁹

The measure of recovery, when the executory purchase is justly abandoned for failure to make title, is fully and ably discussed in *Taylor v. Porter*, already quoted. An account is to be taken upon the following principles: While the vendee remains in possession under his contract he can not be charged with rent, nor with the deterioration or decay of the property which takes place, even by his own neglect, so it be not by his wanton act. He is entitled to recover what he has paid on the purchase money, with interest from the time of disaffirmal; and from that time forward, if he should remain in possession, he must pay rent; against this he may set off the value of the lasting improvements which he has put upon the lands.

The Statute of Frauds demands that the description of the land to be conveyed, as well as the amount and terms of payment, should be stated in the bond,¹⁰ the latter not as the consideration of the former (for that is dispensed with by the very words of the statute), but because it is the condition precedent for the conveyance. But where the uncertainty of description (f. i., "we have swapped our farms") is, after the execution of the writing, removed by giving and taking possession of the intended lands, the written contract becomes complete and enforceable.¹¹

⁸ In the very late case of *Morgan v. Oliver*, 11 Ky. Law Rep. 513, a contract to give up land held under title-bond at a certain day, if the vendee should not then pay the overdue balance was enforced in kind.

⁹ *Kennedy v. Johnson*, 2 Bibb, 12.

¹⁰ *Madeira v. Hopkins*, 12 B. M.

595, 604.

¹¹ *Overstreet v. Rice*, 4 Bush, 8. In an older case (*Robertson v. Thompson*, 9 B. M. 383), it was said that on account of the Statute of Frauds the land must be identified by a construction of the bond alone.

According to all the older cases the Chancellor can not upon parol proof "reform" a written agreement for the sale of land, and then enforce it as thus reformed.¹³ But the majority of the court (Robertson dissenting) overbore this doctrine in the name of "progressive jurisprudence" in 1865, when they reformed a deed by interpolating a vendor's lien, and enforced this by a decree of sale.¹⁴

Where an "expectancy" of a son in a father's estate is sold without the latter's assent, nothing passes; at most the purchase money with interest can be recovered, and if the purchaser be another heir this may be adjusted in settling the estate.¹⁵ But where the ancestor gives his assent to the arrangement, the sale becomes binding, especially where such assent takes the shape of an enforceable contract.¹⁶

Though there has been considerable liberality in excusing vendees from accepting lands bought by executory contract where the title was doubtful, and especially as to vendees not yet put in possession and holding only by a memorandum of purchase, yet it has never been decided that the vendee is entitled to a "merchantable," perfectly smooth title, such as every lawyer would be willing to pass. The Court of Appeals has often been invoked to strengthen a title by a decision between the parties to a contract for land, though their action could never be more than a precedent, and a weak one at that, where the parties in adverse interest are not before it.

While the vendee holds the land by virtue of an executory contract, he is deemed a *quasi* tenant to the holder of the fee, and can not, until he disclaims the relation, acquire an adverse possession within the meaning either of the champerty or limitation laws, as is shown under those respective heads.

SEC. 81. CONVEYANCE OF BAD TITLE. It has not been usual in Kentucky to insert any covenant of title in deeds for the conveyance of land, except that of warranty, which is not

¹³ Smith v. Smith, 4 Bibb, 81, implies it; Harrison v. Talbot, 2 Dana, 268, decides it right out; Churchill v. Rogers, 3 Mon. 81, rejects parol proof tending to widen the boundaries of the land contracted for: all quoted in

the dissent in next case.

¹⁴ Worley v. Tuggle, 4 Bush, 168.

¹⁵ Wheeler v. Wheeler, 2 Metc. 474.

¹⁶ Lee v. Lee, 2 Duv. 184; McBee v. Myers, 4 Bush, 356.

broken until eviction, or its equivalent in the case of encumbrances, *i. e.*, the compulsory payment thereof by the covenantee. There is no marked divergence in the construction of this and the other ordinary covenants in Kentucky, from what it is in the courts of England and of America generally. Here, as elsewhere, the covenants of seizin and against encumbrances, if the title is bad, are broken as soon as made. In the last few years deeds with full covenants have been introduced to some extent in the larger cities.

Land is often sold on credit; it is natural for purchasers in arrear to seek an excuse for non-payment; hence want of title conveyed has often been pleaded, or, under the old practice, made the ground for enjoining a judgment on the purchase notes. On this subject the leading case is *Simpson v. Hawkins*, finally decided in 1833.¹ It appearing that as to part of the land, sold by the plaintiffs in error with warranty, they had "no title," and were insolvent, and that the true owner might still evict the purchaser, the court proceeds: "As yet no eviction has taken place, and the question arises whether a possibility or even a probability that an eviction will hereafter take place, coupled with the insolvency of the (grantors) is sufficient to justify the (purchasers) in withholding the . . . balance of the purchase money. We think it is not." The uncertainty of the future event of the true owner bringing his suit, and bringing it in time, is given as the reason. It is also said that the purchaser accepted the grant and the warranty as an equivalent for his money and notes. The court had found that the sale was made and warranty given in good faith. In such a case the purchasers seeking relief in equity should make their bill also a bill of *quia timet* against the holders of the outstanding title, and should not otherwise be relieved of their debt, nor obtain a rescission. But in case

¹ 1 Dana, 303. First argued in 1831, decided in 1832, after a change in the bench; re-argued before the new bench and concurrent opinions given by Judge Underwood and C. J. Robertson, Judge Nicholas dissenting.

Follows older cases, *Miller v. Long*, 3 A. K. Mar. 336; *Ogden v. Yoder*, 5 J. J. Mar. 425, and *Campbell v. Whittingham*, 5 J. J. Mar. 96, as to the rule that in the absence of fraud the purchaser must rely on his warranty.

of the warrantor's insolvency, a court of equity, it is said, should require a full indemnity to the purchaser against loss, if no final decree can be rendered on the outstanding title on account of the non-residence or infancy of its holders. The grantor's removal from the State, or becoming a non-resident, gives the same ground to the equitable remedy of an indemnity as his insolvency.³ And whether or not a purchaser by title-bond has obtained a decree for specific performance, he stands in the attitude of a grantee by deed when seeking to modify his decree by supplemental bill for defects in the title.³ When the deed embraces a covenant of seizin, "broken as soon as made," it seems that not only under the doctrine of equitable set-off in case of the warrantor's insolvency or non-residence, but by pleading a "counter-claim" under the new practice, a suit for the purchase money could be defeated to the extent recoverable on the covenant.

A representation by the seller that his title is good is in itself no proof of fraud, but his conveying a larger quantity than his own deeds call for is such proof. And bad faith as to the quality and quantity of the land will induce the Chancellor to conclude that there was fraud as to the title, and to decree a rescission.⁴

SEC. 82. SURPLUS AND DEFICIT. On account of the want of good surveys, questions of surplus and deficit have arisen in Kentucky oftener than elsewhere, especially in controversies upon executory sales, and a surplus has been much more frequent than a deficit. In a conveyance the quantity must yield to description, and a surplus or deficiency can only be relieved against on the ground of fraud or mistake. Under an executory contract relief will be granted more readily and on much slighter grounds where the sale is at so much per acre than when it is in gross.

Yet even where a deed had passed, selling at a gross price

³ Taylor v. Lyon, 2 Dana, 228, relying on Chancellor Kent's opinion in 1 and 2 J. C. R. for refusing rescission or a perpetual injunction against the notes.

³ Denny v. Wickliffe, 1 Metc. 279. In this case the method of indemnity foreshadowed in Simpson v. Hawkins was applied.

⁴ Upshaw v Debow, 7 Bush, 446.

a tract said to contain five hundred acres, after a long lapse of time, a surplus of one hundred and one acres was deemed great enough to demand additional compensation.¹ And where the sale was executory and by the acre, compensation was allowed for as little as three acres above the one hundred and seventy-three acres contracted for.² And specific performance was refused to the vendee (except upon terms of rectifying the mistake) where a tract described as four hundred acres, and sold in gross for \$6,000, was found to contain four hundred and ninety acres.³ The price per acre is made the measure of compensation or reduction; interest on this is left to the discretion of the court under the circumstances.

The words "more or less," "be the same more or less," often found in bonds or deeds, must have some effect, yet the discrepancy may be so great as to lead to the conclusion that the parties did not intend to cover it by this phrase.⁴

Where the vendee is bound to take the quantity which he meant to buy out of a larger boundary, or where he has bought an aliquot part of a tract of land, it is his right to select on what side or from what end he will have it, but he must take

¹ Grundy's h'rs v Grundy, 12 B. M. 269.

² Thompson v. Robertson, 9 B. M. 383. As to the time when relief can be given after discovery of fraud or mistake, see under the head of Limitation.

³ Harrison v. Talbot, 2 Dana, 258, 268, vendee must either take 400 acres for the price, or pay \$15 per acre for the tract. The court quotes some Virginia cases; also Young v. Craig, 2 Bibb, 270 ("more or less"—there were 56 acres beyond 425—relief denied); Fisher v. May, 2 Bibb, 451, after conveyance in 1786—lapse of nearly 20 years before suit—compensation denied for 22 acres above 400; Smith v. Smith, specific performance was refused where tract of 189 acres had been sold by mistake as 168; Shelby v. Smith, 2 Mar. 813, distinc-

tion between bonds and deeds is here pointed out; Rodgers v. Garnett, 4 Mon. 269, a conveyance had been made in 1794, when the land was worth little, of a tract supposed to contain 1,700 acres, but measured out 2,000; the court refused to compensate for the surplus. In Hampton v. Eubank, 4 J. J. Mar. 634, a sale in gross of a tract named as containing 400 acres was enforced specifically, though there was an excess of 35 acres, on the ground that it was no greater than what the parties may have expected from bad measurement.

⁴ Fannin v. Bellomy, 5 Bush, 664. Parol evidence was admitted that the sale was intended at a given price per acre, and the tract, said to contain 100 acres, more or less, held 172 acres.

his share in a convenient shape so as not to deprive the remaining land of the vendor of its fair value.⁵

In a very late case (October, 1889) it appeared that a creditor transferred his bid made at a judicial sale to a friend of the debtor, who paid the consideration and took the commissioner's deed as a trustee for the debtor. The land turned out grossly deficient. The creditor was innocent; the debtor must have known that his land was not what it was sold for. His friend was held affected with his guilty knowledge, and was not allowed to recover the difference in value from his assignor.⁶

SEC. 83. PAROL CONTRACTS FOR LAND. Under the Statutes of Conveyances (see Section 59) no freehold nor lease over five years can be created except by deed; under the "Statute of Frauds," as embodied in the Chapter on Contracts of the Revisions, it is enacted: "No action shall be brought to charge any person (*Sixthly*) upon any contract for the sale of any real estate or any lease thereof for a longer term than one year, unless the promise, contract, or agreement . . . or some memorandum or note thereof be in writing and signed by the party to be charged therewith, or by his authorized agent, etc. (the consideration need not be stated in the writing.)"¹ This law does not call such a contract void, and though no action can be based upon it, a defense may,² and if the obligor chooses to fulfill his word, third parties, such as his creditors, or his widow claiming dower, can not complain.³

The Kentucky acts do not contain any equivalent of the

⁵ Harrison v. Talbot, 2 Dana, 268; Owing v. Morgan, 1 Bibb, 274.

⁶ Holmes v. Bramel, S. W. R., Vol. XII, p. 262, not at the time of writing reported in Ky. Law Repts.

¹ Gen. Stat., Ch. 22, Sec. 1. As an instance of strict enforcement, we may refer to the intimation in Thompson v. Mason, 4 Bibb, 198, under the then Statute of Frauds, that a deed made by the defendant under a decree afterward reversed for error can not be read against him

as a memorandum to take the case out of the statute.

² Harrow v. Johnson, 3 Met. 588, where the executors, in consideration of the widow's release of other lands, put her in possession of a tract; held, the creditors could not disturb the verbal allotment by suit.

³ Oldham v. Sale, 1 B. M. 78, where husband after marriage carried out by deed a verbal sale made before it, his widow was held to be barred of her dower.

clause in the English Statute of Frauds, forbidding any trust in land to be raised otherwise than by writing, but in general equity ought to follow the law, which demands a deed to pass the title. On the other hand, a section of the Revised and of the General Statutes (Chap. 63, Art. 1, Sec. 19, of the latter) provides that no trust shall result (except in favor of creditors) from the payment of the consideration by one person, where the deed is made to another, thus cutting off one species of trusts in land which otherwise might have been proved by parol.

The English doctrine, that part performance takes a sale of land out of the statute, so that equity may enforce it specifically, has been rejected in many early and in one very late case.⁴

An agreement upon a boundary line by parol, which is run accordingly, is binding,⁵ but a like change of a line already established or known is not,⁶ nor a line which is run through an accretion from the river, deliberately differing from the line which the law would run between the adjoining owners.⁷ The word "land" in the statute embraces private passways and similar easements, but a dedication for highways is not within the statute.⁸

So far the principles governing parol sales of land seem pretty plain, but there are cases hard to understand, and still harder to reconcile with the express words of the statute, that no freehold shall pass otherwise than by deed, and some of these cases must hereafter be discussed in detail. Where the vendee under a parol sale has taken possession, paid a part or

⁴ *Grant v. Craigmiles*, 1 Bibb, 203, 205; *Chiles v. Woodson*, 2 Bibb, 271; *Johnson's devisees v. McConnell*, 3 Bibb, 1; *Hayden v. McIlvain*, 4 Bibb, 58, never since controverted, and hardly shaken by the dictum of Judge Williams in *Overstreet v. Rice*, 4 Bush, 8, and followed again in *Blackburn v. Blackburn*, 11 Ky. Law Rep. 161.

⁵ *Brown v. Heirs of Crow*, Pr. Dec., 106, 108, relying on *Penn v. Lord*

Baltimore, in 1 Vesey; *Jamison v. Pettit*, 6 Bush, 670.

⁶ *Robinson v. Coen*, 2 Bibb, 125; *Smith v. Dudley*, 1 Litt. 67. The distinction by which to reconcile the cases is given in the text.

⁷ *Miller v. Hepburn*, 8 Bush, 383.

⁸ *Hall v. McLeod*, 2 Met. 103; *Dillon v. Crook*, 11 Bush, 820, 826 (case of a privilege of using a railroad switch).

the whole of the purchase price, and has erected lasting improvements, and the vendor, taking advantage of the Statute of Frauds turns him out, the former can not only recover back all his outlays, but he has a lien for them and for the value of lasting improvements, less reasonable rents, on the footing of the evicted occupant under the "occupying claimant" laws.⁹ In like manner parol evidence was admitted in favor of a lessee whose lease indicated that he would build on the property, to show that he should at the end of the term have leave to move his improvements or to receive payment for them; and an injunction against removing them was dissolved.^{9a}

The trust imposed on the bidder at execution and judicial sales, who lulls the former owner by promises to hold for him, and subject to redemption, has been mentioned in Section 72. But a trust was also declared in a very different case by Judge Robertson in 1870. A father had, during the war, while one son was absent in the Southern army, published his will, by which he devised to his other children his whole estate on their oral promise that they would convey one named tract to the absent son, should he return and be safe from confiscation. After the father's death the son returned, and as confiscation was no longer thought of he was given possession of the tract. Some of the children conveyed their shares: the others acquiesced for a time. After three years' possession he filed a bill of peace against those who had not conveyed, and though they denied the oral agreement, it was sustained and established as a trust.¹⁰

⁹ *McC Campbell v. McC Campbell*, 5 Litt. 91, 98; *McCracken v. Sanders*, 4 Bibb, 511—compensation must be paid before Chancellor will allow judgment in ejectment to be enforced. *Dillion v. Crooks*, *ubi supra*, where appellant spent money on his own property on the faith of an unwritten promise of an easement, and damages were held to be recoverable.

^{9a} *Gray v. Oyler*, 2 Bush, 256.

¹⁰ *Caldwell v. Caldwell*, 7 Bush, 515,

relying on 3 *Atkins*, 539; 3 *Vesey, jr.*, 152; 9 *Ibid.* 519; 11 *Ibid.* 639. These cases, and the other English cases quoted in the opinions of the Chancellor and Master of the Rolls, tend to establish the maxim, that whoever prevents either by fraud, or by an unwritten promise which he afterward does not keep, the owner of land from making a will, codicil, or other instrument which would pass the title, will, notwithstanding the stat-

But how far can one who is in possession of land under a parol contract or sale defend himself against a suit at law or in equity? The Code practice under which an equity may be set up by the defendant in an action at law, while formerly the person defending his possession became a complainant in an injunction bill, gives the purchaser by parol an advantage, if this doctrine is carried out. But in two reported cases, in which the general right to defend the possession by a parol purchase was admitted, it was denied nevertheless, on the ground that the evidence was not, as it should be in such a case, definite and free from doubt; while in another case the defendant really had a written memorandum, and thus the remarks as to the result, if such writing were insufficient, are only a *dictum*.¹¹ But even against a purchaser for value, though with notice, an enforceable lien for the price paid on a previous parol contract was unhesitatingly adjudged, together with compensation for betterments.¹²

A decision made by Judge Robertson in 1870 in favor of a possession of land, unsupported by any writing, created great surprise at the time.¹³ The appellant's father had, in 1852, put her in possession of a farm which he bought for her with \$10,000 received out of a sale of his lands, which fund he was under an obligation (created by word of mouth only) to invest in her name. She claimed it as her own; but though she demanded a deed from him, he refused to convey, promising her (by word of mouth) to devise it to her by will, and so he did. In 1859 he mortgaged the land against her protest to persons affected with notice of her claim. In 1863 he died. The Court of Appeals (by repeated reversals) pro-

ute, be held a trustee for the beneficiary thus deprived of enjoyment. There is in each case some attempt to compromise with the statute, at least by resting the relief on the defendant's answer, which he ought, if the statute is to be regarded, not be compelled to give. No American authority is quoted by counsel or court to sustain the decision of Judge

Robertson, and it will be hard to find any.

¹¹ Nichols v. Nichols, 1 A. K. Mar. 167; Ford v. Ellingwood, 3 Metc. 359; Cornelison v. Cornelison, 1 Bush, 149.

¹² Clough v. Clough, 3 B. M. 66; Blackburn v. Blackburn, *supra*, n. 4.

¹³ Faris v. Dunn, 7 Bush, 276.

tected her claim and possession against the mortgage made by the father, the ostensible owner.

This was followed up in 1871. The plaintiff, while owning a valuable tract, was sued for divorce and alimony. For this, and perhaps other reasons, he allowed his land to be sold under several small decrees and executions; some of the bids were made by a wealthy kinsman, the defendant, and other bids being transferred to him, he became ostensibly the owner, by sheriff's and commissioner's deeds, of the whole tract. It was mainly unimproved, and nothing is said about possession. Eight years after the last, fourteen years after the first purchase, suit was brought to redeem the land, an agreement being alleged that it was to be held as security for advances only, and in trust for plaintiff. The only written evidence was a letter written by defendant before his last purchase, advising the defendant to sell some of his land. From the disparity of price, and the conduct and words of the parties, the court drew the conclusion that defendant held his title as security for advances only, and ordered a redemption. The case differs from those treated in Section 71, in connection with Judicial Sales, in this, that the defendant had done nothing to depress the price at the bidding, or to make himself a trustee by tort; the plaintiff relied upon an agreement by word of mouth against the record.¹⁴

SEC. 84. OCCUPYING CLAIMANTS. There are two independent systems of law under which an occupier of land, evicted by a better title, may be compensated for "improvements"¹ made on land by his labor and outlay; one of the statutes beginning in 1797 and now embodied in Chapter 80 of the Revision of 1873; the other of the equity rules which have grown up in analogy to the statutes from the English rule allowing betterments to be set off against rents and

¹⁴ *Williams v. Williams*, 8 Bush, 241.

¹ In the corresponding statutes elsewhere the words "lasting improvements" or lasting and valuable improvements are used; they were also

in the act of 1820, soon repealed, which applied to all controversies over lands. See *Fisher v. Higgins*, 5 Mon. 140, holding that the obtaining of a ferry privilege is not a "lasting and valuable improvement."

profits, but which are in the Kentucky cases called "common law."

The statute applies only in favor of him who is evicted because his title derived from the Commonwealth is younger at the fountain-head than that of his adversary; the rule in equity applies in other cases. The remedy under the statute is an inquest before a justice, returnable into the Circuit Court which had adjudged the land; the remedy in equity was formerly invoked in most cases by injunction suit, but can now be had by an equitable counter-claim in a suit at law.

By the present statute, "if any person believing himself to be the owner by reason of a claim in law or equity, the foundation of which being in public record, hath or shall hereafter peacefully seat or improve any land, but which land shall upon judicial investigation be decided to belong to another, the value of the improvements shall be paid by the successful party, etc., before the court rendering judgment . . . of eviction shall cause possession to be delivered, etc."³

It has been held that a claim derived by title-bond from "an entry and survey" comes within the statute³ as much as a grant. But the occupier must connect himself with the "foundation in public record," *i. e.*, a grant or entry and survey from the Commonwealth, by a chain in which every link is sound.⁴ If he does, his "belief" when he made the improvements, or bought the land with them, in other words, the notice which he might have of the outstanding elder grant, will not be inquired into, for the belief or "supposition" (of an older statute) is to be only based on the government grant from which the occupant's own title flows.⁵

³ The same language is used in Ch. 70 of Rev. Stat., taken mainly from act of 1812. M. and B. Stat. 123. As to conflict with Compact with Virginia, see Sec. 52. No question can be raised when the elder title is not a Virginia claim. (*Pulliam v. Robinson*, 1 Mon. 229.)

³ *Ibid.*

⁴ *Fairbairn v. Means*, 4 Met. 323, and the patent must actually embrace

the land: *Clay v. Miller*, 4 Bibb, 461.

⁵ *Lewis' heirs v. Singleton's heirs*, 1 Mar. 528. The statutes apply only to controversies under different grants. The act of 1820 applied to all *bona fide* claims, but was repealed in 1824. The same was said, inconsiderately, of Ch. 70 of the R. St., by Judge Hardin, in two cases in 8 and 9 Bush, though the proceedings in no way conformed to the statute.

The statute takes from the successful claimant under a conflicting grant the *mesne* profits otherwise allowed, and gives him only "the damages which may have been done the land by cultivation and unnecessary waste of timber *after* the suit was instituted (and) the rents and profits which have accrued after final judgment . . . of eviction," while the occupier is allowed "the value of the improvements of the land from which the occupant is to be evicted, to be estimated as of the time" of the inquest. Very kindly, the statute provides that if the winning litigant's lands are sold under the lien which it gives for the balance against him, the occupant's claim is thereby satisfied.⁶

A patent issued for county warrants since 1835, when laid upon lands theretofore entered or granted, is void (see *supra*, Sections 56, 57), and does not lay a foundation in "a public record." As in conflicts over wild lands, in our times, the junior patent is generally of this worthless breed, there is but seldom room for the statutory inquest; yet a case came up in 1888.⁷

Under the equitable rule or "common law" a very low degree of "good faith" is deemed sufficient to compensate the occupier for his work and outlay.

A constructive notice, such as a lawyer would obtain from searching the records, is no obstacle to his claim for improvements.⁸ But where the defendant buys a married woman's lands from the husband, being fully advised of the facts and consequences, he can not be relieved, as the *feme* can not be compelled to pay for work and material thus sunk upon her land.⁹ Where a person takes title to land and enters on it

⁶To prevent the recurrence of the sad result reported in *Belshe v. Barret*, 5 Mon. 590, where the successful litigant lost the land and improvements and all his other property through the judgment for improvements.

⁷*Counts v. Kitchen*, 87 Ky. 47, where an inquest was adjudged upon petition in equity, the term of the judgment having passed by, but the

court refused to enjoin the writ of possession.

⁸*Thomas v. Thomas' ex'r*, 16 B. M. 421, where a widow reclaimed from a distant grantee land for which she had during coverture given an invalid deed; *Clay v. Miller*, 2 Litt. 279, where the occupant misunderstood a description of a publicly recorded instrument.

⁹*Barlow v. Bell*, 1 Mar. 246.

bona fide, supposing it to be his own, he must be paid for his improvements.¹⁰

On one point the decisions are very hard to reconcile. Some of them distinguish between "improvements" generally and between such as increase the vendible value of the land, and allow a recovery for the former only to an occupant holding and improving in good faith, while an allowance for enhanced value is to be made even to one who improves in what technically is bad faith, namely, after suit brought. But the most recent cases limit the compensation at all events to the increase of value which the improvements leave to the successful claimant. The measure of rents, damages, and compensation for improvements is defined at large by Chief Justice Robertson in a leading case which came before the court in 1839 and 1840.¹¹ By the mandate on the first reversal, the lower court was told that though the complainants could not recover rents older than five years at the beginning of the suit they might "set off the rents and profits *for previous years*, and of the whole period as far as may be necessary, against any claim which the defendants may have . . . for *ameliorations* to the land, and to *improvements* made on it in good faith." Being so told, and finding that the rents from 1827, the five year limit down, exceeded the value of all the improvements, the court below thought it "not necessary to consider the earlier rents." On a second appeal the former mandate was construed: "The rents accruing before 1827, though barred and *because* barred, should be *first* set off against any claim for improvements and ameliorations," giving the complainant (the land was recovered in equity) thus all the otherwise barred *mesne* profits, and remarking that this was just, as the rents had paid for the improvements. On cross errors they distinguished

¹⁰ Bell's heirs v. Barnett, 2 J. J. Mar. 516, quoted 16 B. M. 425, with the remark: "And the same doctrine is recognized throughout the books," which is too sweeping, as the doctrine, except as to recoupment of *mesne* profits, is of modern growth, mainly under recent American statutes. (See Green v. Biddle, 8 Wheat.

2.) In a case quoted below, Taylor's heirs v. Whiting's heirs, there was very little good faith; the ancestor of the occupants was an intruder seeking to gain a title by fraud.

¹¹ Whiting's heirs v. Taylor's heirs, 8 Dana, 403, 442, and Taylor's heirs v. Whiting's heirs, 9 Dana, 399.

between improvements and ameliorations, the latter being limited to the actual gain of the land in vendible value, and thus implying that the former might be estimated on some undefined, more favorable scale, perhaps their cost; but improvements must be made in good faith, while ameliorations, estimated as above, might be allowed for (at least as against rents) even if made after suit brought, but "in good faith in fact."

A later case¹² has put the measure of compensation on a safer footing. The rule laid down in Story's Equity Jurisprudence, Section 1237, is approved, and even as to an "*innocent purchaser* generally the amount of the allowance depends on the actual enhancement of the value rather than the cost of the improvements." Here, however, the military power had long used the property without paying rent, and had afterward left a valuable house upon it and sold it to the occupant at a very low price. Under these circumstances the occupant was not charged with rents, but allowed only the small sum which he paid to the military authorities. In the next year it was again held, though the occupants acted in perfect good faith, that "the value of improvements should not be estimated according to their original cost, but by the increase in the vendible value of the property, when recovered, arising from the improvements; and in no event should the liability exceed the consequent enhancement of the value, rents, waste, and deterioration being of course deducted."¹³

The courts would no longer, either in "common law" or in statute cases, compel the successful litigant to give up the whole of his improved land, and pay a balance over and above it, to compensate the occupant for his improvements.¹⁴

Where land held by the improving occupant is sold by a chancery court for division, or on other grounds binding on the true owners, these will be paid out of the proceeds what the land was worth in its unimproved state, the residue going to the improver.¹⁵

¹² Hall v. Brummal, 7 Bush, 44.

¹³ Proctor v. Smith, 8 Bush, 85. Same as to improvements made by holder under parol sale. Booth's ex'r v. Vanarsdale, 9 Bush, 717.

¹⁴ It was held formerly that the

successful claimant, after commissioner's report in a "common law" case, can not surrender the land, but must pay. (Clay v. Miller, 2 Litt. 281.)

¹⁵ Burton v. Little, 9 Bush, 807.

CHAPTER XIII.

VARIOUS ESTATES.

SEC. 85. Words of Purchase or Limitation.

SEC. 86. Construction of Grants and Devises.

SEC. 87. Marital Rights, including Curtesy.

SEC. 88. Dower and Quarantine.

SEC. 89. Joint Estates.

SEC. 90. Leases.

SEC. 91. The Homestead.

SECTION 85. WORDS OF PURCHASE OR LIMITATION. The Virginia act of 1776, embodied in the Kentucky conveyance law of 1796,¹ which turned every fee-tail into a fee-simple, did, if it was intended to untie men's estates, more harm than good. For, in order to give some effect to the intent of a grantor or testator, words which before the statute would have raised an entail, and would thus only have hampered the estate by the cost and trouble of a fine or recovery, were now turned into strict settlements, either a life estate with remainder in fee or a defeasible fee and executory devise. Thus, a devise to "A. B. and her children," she having no children at the time, would under the English authorities give to A. B. an estate tail, which, as against the issue, she could bar by a fine, but it was held in Kentucky that she takes a life estate with remainder to such children as she may leave at her death.² And a devise to J. S., "and if he should die without issue," then to X. and his heirs, which under the statute *de donis* gave to J. S. a fee-tail which he could turn into a fee-simple

¹ M. and B. Stat., I, 442 (Sec. 10); Litt. Laws Ky., I, 570. The statute was somewhat reluctantly carried out in 1888, in *McCauley, etc., v. Buckner*, 87 Ky. 191, where a testator devised land to his daughter "and her lawful

heirs," and it was held a fee in her though the will showed an intent to exclude the control of her husband.

² *Carr v. Estill*, 16 B. M. 309, 312, quoting *Powell on Devises*, 494, for the old doctrine.

by a common recovery even against remainder-men, is now construed to mean "if he should die without issue (including children *en ventre sa mere*) living at the time of his death," and becomes a defeasible fee in the first taker, with an executory devise or "possibility" to the second, who is thus secured against being cut off by the acts of the former.³ In general it is said the intent to create an estate tail or a perpetuity will not be assumed when a grant or devise will bear any other construction,⁴ though in fact the court has often established a strict settlement by hunting after the testator's intention as the "guiding star" in a will in which the words by their legal meaning imported a fee; for instance, where the testator left one farm to his daughter "and her bodily heirs," and another "to her and her heirs and assigns, to dispose of as she wishes;" a life estate with remainder to her issue was declared in the former.⁵

In 1854 the Court of Appeals held that the rule in Shelley's case, which had never been fully recognized in Kentucky, was local to England and not applicable here, and gave to the heirs land by purchase which under the rule would have been barred by the deed or will of the first taker.⁶ Meanwhile the Revised Statutes had abrogated the rule as to subsequent deeds and wills.⁷

It was thought by the court and the legislature not to be worth while to break up a perpetuity here and there by taking advantage of the unskillfulness of the draftsman, as long as a skillful conveyancer can tie up an estate for "a life or any

³ The old construction is still maintained in *Gist's heirs v. Robinett*, 8 Bibb, 2, the new construction leading to the defeasible fee in *Daniel v. Thompson*, 14 B. M. 708 (1854), and in all the later cases. Of previous cases, *Moore v. Howe*, 4 Mon 208, deals with personalty. The new rule is fixed by Rev. Stat., Chap. 80, Sec. 9; Gen. Stat., Chap. 63, Art. I, Sec. 9.

⁴ *Moore v. Moore*, 12 B. M. 659; *Davis v. Wood*, 17 B. M. 93.

⁵ *Righter v. Forester*, 1 Bush, 278.

⁶ *Turman v. White's heirs*, 14 B. M. 560. But a deed made before Rev. Stat. "granting" certain lands to A. B. and his heirs, *habendum* "to A. B. for life, and remainder thereafter to said A. B's heirs," was held to give a fee, the granting clause prevailing over the *habendum*.

⁷ Gen. Stat., Chap. 63, Art. I, Sec. 10, Rev. Stat., Chap. 80, Sec. 10.

number of lives in being, and twenty-one years and ten months thereafter."

But where a grantor gives the reversion to his own heirs, they are supposed to be "in" under his original title; the fee remains in the grantor and may be devised (subject to the particular estate) by his last will.⁸

And a devise to A., "and after her death to descend to her heirs," gives her a fee-simple, the word "to descend" being understood in its legal sense.⁹ And where such seemed to be testator's meaning, even such words as these, "half of my estate at my wife's death to go to *her relatives*," were construed as merely turning her freehold into a fee.¹⁰ A devise to A. for life, and "after his death—to his descendants in the same manner as it would pass by the law of descents—from him," gives A.'s widow a life estate to one third.¹¹ The habit of "settling" lands is far too prevalent in Kentucky; it has ruined many young men in mind and body, and it calls for some heroic remedy by legislation.¹²

SEC. 86. CONSTRUCTION OF GRANTS AND DEVISES. In construing devises, which might raise estates of one or another kind, and in affixing a meaning to the words "heirs," "children," "lawful issue," "family," etc., which so often occur in wills and family settlements, the Court of Appeals has not attempted to strike out upon a path of its own, or to set up a special system for Kentucky. However, it is necessary to consider a few of the most common phrases which have given the court some trouble, and which have led to really or apparently conflicting opinions.

I. "*To A. B. and her children.*" It may always be shown whether or not A. B. had children at the date of the will or

⁸ Alexander v. DeKermel, 88 Ky. 345.

⁹ Wedekind v. Hallenbeek, 10 Ky. Law Rep. 696. In Mefford v. Dougherty, 11 Ky. Law Rep. 157, devise to "my son G. and his children, being bodily heirs," was held not to give him a fee-simple. (See this and similar cases in next Section, subs. I.)

¹⁰ Mudd v. Mullican, 11 Ky. Law Rep. 417.

¹¹ Jacob v. Jacob, 4 Bush, 110.

¹² An American constitution, in its care for vested rights, will not allow us to go as far as the English "Settled Estates Act" of 1882, which is printed at large in Lewin on Trusts.

deed. The question arises: Shall the parent and children take a joint estate in fee, or shall they take successively; she for life, they in remainder? The Court of Appeals has recognized the English rule, as stated in *Powell on Devises*, that the existence of children at the time favors the joint estate which will "open" and let in after-born children, while in the absence of children the words will raise an estate tail in the mother; but they have turned this into a life estate in her, remainder to the children.¹

A deed *inter partes* could not at common law confer a present estate on a person not a party, and in one of the older cases of a deed to a married woman "for the entire benefit of her and his children" was construed as a life estate of the whole to her, with remainder to all children born before or after, as the only means of benefiting them.² A case in which a grant by deed to a childless married woman "and her child or children" was construed into raising a joint estate³ has since been disapproved as ill considered. In the overruling opinion the court referred to the difficulty about a deed *inter partes*, also to the unlikelihood that the grantor meant to give a fee in part of his land to his wife, which might thus be carried away from his own blood even in his own lifetime (the clause of the Code of Practice revoking all gifts in case of divorce was not yet in force); the court also considered the

¹ *Carr v. Estill*, 16 B. M. 309. It was said also in a much older case that the natural import of the words, when there are children, is to make parent and children tenants in common; but when in another part of the will the parent alone is named as the object of bounty, she will take for life, and the children (including those born after the testator's death) will take a *vested* remainder, so as to transfer their shares, if dying before the parent, to their general heirs. (*Turner v. Patterson*, 5 Dana, 292, 295.) This is followed in *Mefford v. Dougherty*, 11 Ky. Law Rep. 157, where, however, little more is decided than

that the first taker did not take an estate tail.

² *Webb v. Holmes*, 3 B. M. 404. This view was much strengthened by the grantor's calling the estate a "dower." The technical reasoning was hardly applicable, as a trust may certainly be raised for a stranger also (*Foster v. Shreve*, 6 Bush, 523) on a grant "to S. R. and her present heirs," in a deed of 1813. Here the reasoning as to a deed *inter partes* is fully applicable and strongly insisted on, and the question said to be settled.

³ *Powell v. Powell*, 5 Bush, 619 (1869).

tender age of the only child at the date of the deed, and clauses as to the rents and profits, maintaining that it is "utterly unreasonable to apply to every deed or will the same rule of construction."⁴

Where none of these considerations came in, there being a title bond, not a deed *inter partes*, the grantee a son, and nothing to denote the beneficiaries but the words "W. W. C. and his lawful children," the court declared a joint estate, as well in favor of the after-born as the existing children, the father taking the share of one child.⁵

A joint estate was also declared under a devise in special trust "for A. B. (the testator's daughter) and her children;" it was said that the result would not be changed if this "special" trust gave to A. B. a separate estate.⁶

In a late case a deed was made to "N. B. and her children, of the second part," thus removing the technical point against the joint estate; in the granting clause "to them and their heirs" is added after "N. B. and her children;" N. B. was the grantor's daughter. She and her children were declared joint tenants, and the court said that the creation of a joint estate is the natural import of the words.⁷

In the next case the report only shows a conveyance "to the grantor's wife and children;" the record shows a deed to five persons by name, that is, the wife and four children, "and to such heirs as shall be born to us hereafter." In a suit by the youngest child, which was defended on other grounds, one fifth in present interest was awarded.⁸ The point that a remainder only passed was not raised.

In the last reported case a testator devised all his estate "to my wife — for her and her child E.'s sole use and benefit;" but though the court admitted that such words by themselves give a joint estate, they took hold of the tender

⁴ Davis v. Hardin, 80 Ky. 672.

⁵ Cessna v. Cessna, 4 Bush, 516; the only case of a grant to a man and his children.

⁶ Gill's heirs v. Logan's heirs, 11 B. M. 231.

⁷ Bullock v. Caldwell, 81 Ky. 566; reinstating Powell v. Powell, which had been overruled in 80 Ky. 672, as authority.

⁸ Brown v. Connell, 80 Ky. 403.

age of the daughter at the time of the will, of a power of sale given to the widow to sell one of the tracts of land, "but no other," and the words "sole use" as an indication that she was to have a life estate, and that the daughter was to have the whole fee.⁹ The law on the subject has been left in a rather embarrassing state, but the tendency is toward the life estate and remainder.

II. *When Children include Grandchildren.* When at the time of writing a will the testator, or any one named in the will, has living children and grandchildren representing dead children, it was long the Kentucky rule to construe a devise to children literally, so as to exclude grandchildren.¹⁰

The clause of the Revised and General Statutes, that "where a devise is made to several as a class . . . and one . . . of the *devisees* shall die before the testator, etc., the share . . . shall go to his . . . descendants, if any, if none, to the surviving devisees, etc.," and another, "if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue, etc., such issue shall take the estate, etc.," could not help the issue of the deceased child, because the child never was a devisee, as it never answered the description. But in 1866 Judge Robertson, in the last reported case on this question, shook, or perhaps upset this rule, holding that the words of the statute, "one . . . shall die before the testator," apply as well to such as die before the publication of the will as to such as die after it. The clause devising an estate to the "children" of C. B., deceased, named one grandchild by a deceased child specially, and gave her the share of her parent; yet the court let in another grandchild standing in the same attitude, and not thus named.¹¹

⁹ *Kraft v. Koenig*, 87 Ky. 95. The word "jointly" of course removes all doubt, though it might refer to the children alone (*Proctor v. Smith*, 8 Bush, 81), referring to a former appeal upon the same record. The opinion in that can not be found.

¹⁰ *Churchill v. Churchill*, 2 Metc. 466; *Sheets v. Grubbs*, 4 Metc. 339. There is a query in the latter case,

whether it might not be shown with effect, that the testator thought the child still alive, and thus had her in his mind as a devisee. The statute provisions are found, one in Ch. 46 of Rev. Stat. (Gen. Stat., Ch. 50) Art. XXV, the other Rev. Stat., Ch. 106 (Gen. Stat., Ch. 113), Sec. 18.

¹¹ *Dunlap v. Shreve's ex'rs*, 2 Duv. 384, Williams, J., dissenting.

III. *Under Age or without Issue.* Wills often contain a devise to an infant in fee, to be defeated if he or she should die under age *or* without issue. As there is no motive for diverting the devise from the issue of a parent dying under age, efforts have been made to construe the particle *or* in such a clause into *and*, so that death without issue *and* under age, must concur for the defeasance. The court decided against such substitution; it was in a case where the word *or* was strengthened by the addition "then and in either case," but from its reasoning must have acted in like manner even without these words.¹²

IV. *Provisions for Support.* As any interest in lands belonging to a judgment debtor may be reached by creditor's bill, and an express trust in lands even by execution, donors and testators often seek to give some thriftless child or friend a support without giving him an estate, which might be subject to his debts.

It was held at an early day that a transfer to A. "in trust, that the proceeds of hire be applied to the maintenance of B. during his life," gives to B. a life estate in the thing transferred.¹³

In a recent case, involving a great property, the court passed upon this devise to a trustee for the testator's eldest child: "He shall collect rents, and after paying taxes, insurance, and repairs, pay the rent to the child in person quarterly" for life, and added that it is his desire to *shield* the child against casualty. It was treated as an equitable life estate, so as to pass under the general words of an assignment for creditors ("all my estate, real, personal, and mixed"); and it was held that the wife and children of the assignor have no equity of their own in this life estate, though the testator assigned as a reason for giving to this son more than to others, that he had a greater family and greater necessities.¹⁴

¹² Parrish v. Vaughn, 12 Bush, 97; "the testator had the right to make an absurd disposition of his property."

¹³ Eastland v. Jordan, 8 Bibb, 186. Case of slave held subject to *fi. fa.*

The rule that giving the income of an estate is giving the estate is as old as Lord Coke, or older.

¹⁴ Knefler v. Shreve, 78 Ky. 297.

If there is an estate it is by law subject to the donee's or devisee's debts,

On the other hand the following devise: "My executor shall give and allow to A. W. during her life the use, benefit, and enjoyment of the dwelling, etc., together with 20 acres, etc.," was held to give to A. W. "no specific estate, legal or equitable, which she could alienate or dispose of, nor any debt to her which either she or her creditors could enforce"—a judgment rather hard to reconcile with the other Kentucky cases.¹⁵

The giving of a support to the object of bounty to be ad-measured by a trustee confers no estate, and where a small sum per month "for support" is named, and is not too large for supporting the recipient, this sum will be considered as simply an upper limit.¹⁶ But in a somewhat later case a "comfortable support," to be paid out of the rents and profits of an estate, or if need be out of the principal, was held to be a tangible interest, subject to a creditor's demand.¹⁷

That a devise to the widow of a farm and farm stock "for the support of all the family" gives an immediate interest to the children, was adjudged incidentally.¹⁸ A devise being made in trust for the testator's son "for his use and benefit, for the support and maintenance of himself, wife, and children during his life," gives to the son, the wife, and the children an estate in common, each having a proportional share; and the estate will open up to let in after-born children; the share of the named devisee alone is liable to his creditors.¹⁹

The modern cases under this head show a strong inclination not to let the creditors of the indebted donee or devisee get what was not intended for them.

V. *Failure of Issue in Remainder-man.* Where, after a

any words in the grant or devise to the contrary notwithstanding. (Samuel & Johnson v. Ellis, 12 B. M. 483; Carlin's adm'r v. Carlin, 8 Bush, 141, 146.) Part of the estate covered by the same will came under the jurisdiction of the U. S. Ct. in the N. D. of Illinois, which decided in favor of the family, and against the claim of the creditors under the assignment, or otherwise.

¹⁵ White v. Thomas, trustee, 8 Bush, 662.

¹⁶ Pope's ex'r v. Elliott, 8 B. M. 61.

¹⁷ Salter v. Samuel, 8 Met. 259.

¹⁸ Stillwell v. Leavy, 84 Ky. 379; see *infra*, Sec. 101.

¹⁹ Rudd v. Hagan, 86 Ky. 159. The words added, "that the son's interest shall in nowise be liable for his debts," were held to be ineffectual.

life estate devised to A. the remainder in fee is given to B., but should he die without issue then the estate to go to C., the devise will (unless there are controlling words) be construed as if it read : if B. should die without issue during A.'s life ; and if B. survives A., he takes an indefeasible estate. This is recognized as an old rule of construction, and is applied to a case where no particular estate is limited before B., but the beneficial possession is to begin at a stated future time.²⁰ If B. lives beyond that time he takes an indefeasible estate.

VI. *Vested and Contingent Remainders.* The Court of Appeals has always sought to keep itself in line with the English and other American courts as to the distinction between vested and contingent remainders, and has not developed a local doctrine on the subject,²¹ professing so to construe devises as to favor the vesting of remainders.²² "A contingent remainder shall in no case fail for the want of a particular estate to support it."²³

SEC. 87. MARITAL RIGHTS AND CURTESY. The power of the husband over the lands of his wife as it existed at common law was first abridged by an act of February, 1846,¹ of which the substance is re-enacted both in the Revised and in the General Statutes, in the latter of which it reads thus :

"Marriage shall give to the husband during the life of his wife no estate or interest in her real estate, including chattels real, . . . except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent" (the rent for the whole term subject to the wife's debts going to the husband on her death, or to her on his death), "such real estate or rent shall not be liable for any debt or responsibility of his . . . , but . . . for her debts and responsibilities incurred before marriage, and for such contracted after marriage on account of necessities for herself or any member of her family, her husband included, as shall be evidenced by

²⁰ Thackston v. Watson, 84 Ky. 206.

²¹ Williamson v. Williamson, 18 B. M. 329, 369, where Preston on Estates and Fearn on Contingent Remainders are freely quoted.

²² Wedekind v. Hallenbeck, 10 Ky. Law Rep. 696.

²³ Gen. Stat., Chap. 63, Art. I, Section 2.

¹ Sess. Acts, 1846, p. 42

writing signed by her. . . . The husband's contingent right of curtesy or life estate, or his right to such use or rent, shall not be . . . subjected to" his debt during her life.²

The husband retains not only the common law right, by which his consent is required before the wife can convey her "general estate" in lands, but she must have his co-operation, as we have seen in Section 63, to sell her separate estate. She can regain the power to deal with her own realty, during her husband's life, in the following ways:

1. By a divorce *a vinculo*.
2. By a divorce *a mensa and toro*.³
3. By decree in an equitable action against her husband, "where (he) abandons his wife, or fails to make sufficient provision for her maintenance, or where he is confined in the penitentiary for an unexpired term of more than one year," or becomes permanently deranged; which may be set aside in the court's discretion.⁴
4. By judgment, either on joint petition of husband and wife, or wife against husband, to give to the wife all or some of the powers of a *feme sole* as to property and contracts.⁵ Some ground must be assigned, either that she has property to manage, or ability to carry on some business.⁶

A woman coming into the State without her husband, he residing elsewhere, has also the powers of a *feme sole*, and can lose them only through the judgment of a court of equity.⁷

² Gen. Stat., Chap. 52, Art. II, Secs. 1 and 2; Rev. Stat., Chap. 47, Art. II, Secs. 1 and 2. Before the Gen. Statutes the obligation of the wife for necessities had to be signed by husband with her. The absolute deed of the husband alone, or of husband and wife, where it is void or voidable on her part, are said to give to the grantee the right of using the land for three years; he is not thereafter entitled to notice to quit. (*Hardin v. Garrard*, 10 Bush, 259.)

³ Gen. Stat., Chap. 52 (R. S. 47), Art. III, Sec. 8.

⁴ *Ibid.*, Art. II, Sec. 5, as amended

in March, 1873, see B. and F. ed. Gen. Stat., p. 723. The powers given by these statutes are not cumulative, but the common law rule as to a wife of one who has "abjured the realm" or fled from justice, regaining her full powers of contracting and owning property, is repealed. (*Hannon v. Madden*, 10 Bush, 664.)

⁵ Act of February 14, 1866; *Myers'* Suppl., p. 728. See Sections 69 and 78 *supra* as to publication.

⁶ *Ex parte Franklin*, 79 Ky. 497.

⁷ Gen. Stat., Chap. 52, Art. II, Sec. 10. No case has been reported under this law. It is not clear but that the

The obligation of the wife, by which she can bind her own lands, is generally enforced by suit in equity, the property being named in the petition and decree. Only lands held by her "generally" can be subjected, not separate estate.⁸ The court will judge whether the thing contracted for was necessary, and though the price or rent of a dwelling house is clearly one of the things for which she may contract,⁹ yet if she have already a house suitable to her means and condition, her contract for the price of building an "ell" will not be enforced.¹⁰ Money used to free the husband from conscription in the army is not embraced among "necessaries for the family,"¹¹ but a sewing machine is.¹² In allowing a married woman to charge her lands for necessaries, the law meant clearly that she should not charge them with business obligations; and where she keeps a hotel the supplies for it can not be considered as necessaries.¹³ Nor is she concluded by the recital in her note that it is given for necessaries; the consideration is open for proof.¹⁴

Curtesy is defined by the statute in words declaratory of the common law, unless a clause subjecting it to the debts of the wife incurred after marriage be an innovation.¹⁵ The words "owned or possessed of the wife," which stand for the "actual seizin" required by the common law, are construed more narrowly than elsewhere;¹⁶ that is, the husband has no

husband's coming into the State to reside would *ipso facto* take from his wife her power as a *feme sole*. Another act (February 17, 1874, B. and F. ed. Gen. Stat. p. 743) makes the receipt of a married woman, attested by two witnesses, good for rent or interest due upon her estates "in case of abandonment, non-residence, or profligacy of her husband."

⁸ McMahan v. Lewis, 4 Bush, 188; Gatewood v. Bryan, 7 Bush, 509.

⁹ Bergen v. Forsythe, 17 B. M. 551, 556, "suitable for their condition." (Marshall v. Miller, 8 Met. 333.)

¹⁰ Pell v. Cole, 2 Metc. 252.

¹¹ Ford v. Teal, 7 Bush, 156.

¹² Singer Manuf'g Co. v. Harned, 79 Ky. 279. It was held in this case that after-acquired lands are liable to the note for necessaries.

¹³ Harris v. Dale, 5 Bush, 61. A distinction is drawn here which seems wholly intangible, between keeping a hotel as a business of profit or merely as a means of support.

¹⁴ Sharp's adm'r v. Proctor's adm'r, 5 Bush, 396.

¹⁵ G. S., Chap. 52, Art. IV, Sec. 1.

¹⁶ See Jackson *ex dim.* v. Sellick, 8 Johns. R. 271; Davis v. Mason, 1 Peters, 507, both allowing curtesy in wild lands, and openly disregarded by the Court of Appeals.

curtesy in wild lands, unless he takes actual possession, on the alleged ground that under the land system of Kentucky it is more than elsewhere the husband's duty to strengthen the wife's title by possession, and he can only thus earn his curtesy.¹⁷

A similar principle would apply to vacant town lots, but we believe that in practice curtesy in such lands is generally allowed, and no case is reported in which the question was raised.

However, an amicable possession of the wife's land, for instance, that of a joint owner recognizing her title, or of the donor who has not re-called the gift, gives actual seizin, which entitles the husband to curtesy.¹⁸

An ante-nuptial contract or post-nuptial deed settling the wife's land on her as separate estate, with powers to devise or dispose of, do not bar the husband's curtesy unless these powers are exercised so as to exclude him.¹⁹

A divorce *a vinculo* takes the husband's curtesy away, but it is not affected by a divorce *a mensa*, nor by a *feme sole* decree obtained in any of the statutory methods.²⁰

A court granting a divorce can not, by its provision for alimony or maintenance of children, deprive either party of the fee-simple in lands;²¹ but "every judgment for a divorce (*a vinculo*) shall contain an order restoring any property not disposed of at the commencement of the action which either party may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof; and any property so obtained without valuable consideration shall be deemed to have been" thus obtained.²² The old Code did not contain the clause in italics, and under it the court held (and would probably do so again notwithstanding this clause) that the husband is not, by a divorce *a vinculo*,

¹⁷ Neely v. Butler, 10 B.M. 48; Conner v. Downer, 4 Bush, 681.

¹⁸ Yankey v. Sweeney, 85 Ky. 55, 65.

¹⁹ Hart v. Soward, 14 B. M. 30.

²⁰ Gen. Statutes, Ch. 52, Art. IV, Sec. 14.

²¹ Gen. Stat., Chap. 52. Art. III, Sec. 7.

²² O. P. '76, Sec. 425 (Sec. 462 in C. P. of '54). The order is formal, and its effect is to be settled by subsequent proceedings.

restored to property which he has settled on the wife for her maintenance by way of compromising a former divorce suit.²³ A case arose in 1870,²⁴ as to land of the wife which the husband alone had conveyed in 1844, when the common law made his deed effective during their joint lives. Being divorced afterward she sued the husband's grantee, and the court restored the land to her, as it would have done as against the husband himself. In a suit for divorce from bed and board, the court can not divest the parties of title to land which they may have derived by gift from each other; certainly such land can not be taken from the wife on the notion that the consideration has failed by her undutiful conduct.²⁵

NOTE.—As to separate estate see further, Section 109, *infra*.

SEC. 88. DOWER AND QUARANTINE. By statute since 1852, as formerly by common law, the widow has dower in any land of which the husband has held the legal title in "fee-simple" at any time during coverture; but of land held by him under executory contract only, if he dies seized; and if before marriage he (or his trustee having the power) has contracted to convey any land, he may after marriage carry out the contract (though it be by parol) by a deed, in which the wife need not join.¹ The rule as to executory contracts (which include confirmed bids at judicial sales not followed by deed) should perhaps be extended to other equitable titles, but until the question has been passed on by the Court of Appeals it would not be safe to buy land held in fee on a naked trust, unless the wife of the beneficiary will join in the deed to bar her dower. Though the statute says "in fee-simple," the courts would, it seems, as before 1852, award dower out of a defeasible fee, even when this is defeated by failure of issue, the usual ground of defeasance.²

²³ Flood v. Flood, 7 Bush, 167.

²⁴ Hays v. Sanderson, 7 Bush, 489.

²⁵ Orr v. Orr, 8 Bush, 156.

¹ Gen. Stat., Ch. 52, Art. IV, Secs. 2, 12 (2 and 13 in Rev. Stat.); Fon-

taine v. Dunlap, 81 Ky. 321. (See Oldham & Sale, Sec. 83, n. 3.)

² Daniel v. McManama, 1 Bush, 547 (where the inheritance was not defeated); Northcutt v. Whipp, 12 B. M. 71 (where it was).

Actual possession is not needed, as in the case of curtesy, but there must be legal seizin, that is, no outstanding freehold.³ A divorce *a vinculo*, though obtained in another State, bars dower in Kentucky lands.⁴

Dower is forfeited where the wife "voluntarily leaves the husband and lives in adultery," and that even if she does not elope and live steadily with one man.⁵ A deed, in order to bar dower, must not only be acknowledged, etc., in conformity to law, but it must also contain words by which the *feme* parts with her estate; the signature alone when attached to the husband's deed is of no effect.⁶

Where a deed made by the husband in which the wife joined to bar dower is set aside as fraudulent at the instance of creditors, the release of dower does not inure to the purchaser under the execution or decretal sale; but where the deed is attacked as an unlawful preference, under Article 2 of Chapter 44 of the General Statutes (the "act of 1856") and is turned into a general assignment, the release of dower stands for the benefit of all the creditors, and this though the deed be a mortgage for a sum greatly less than the value of the land.⁷

The statute deals with nearly all the questions which oftenest arise in suits for dower: (1) The effect of superior liens; (2) Election between dower and a jointure or devise; (3) The basis of value; (4) Quarantine and back rents.

I. "The wife shall not be endowed of land sold in good faith after marriage to satisfy a lien . . . created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money;" but she is to "have dower . . .

³ Gen. Stat., Ch. 52, Art. IV, Sec. 4; *Arnold v. Arnold*, 8 B. M. 204; *Butler v. Cheatham*, 8 Bush, 595.

⁴ Gen. Stat., Ch. 52, Art. IV, Sec. 14; *Hawkins v. Ragsdale*, 80 Ky. 353. But not a divorce *a mensa*, *ibid.*, Art. III, Sec. 8.

⁵ Gen. Stat., Ch. 52, Art. IV, Sec. 8, applied in *Goss v. Froman*, 11 Ky. Law Rep. 631.

⁶ *Prather v. McDowell*, 8 Bush, 46. In this case the deed reserved certain

rights to the wife incompatible with dower, but in the absence of any granting words on her part the court was unwilling to work out an exchange of her dower for those rights. For the rules on acknowledgment and recording see *supra*, Section 61.

⁷ *Lowry v. Fisher*, 2 Bush, 78 (a deed set aside as fraudulent); *Cantrill v. Risk*, 7 Bush, 158 (a mortgage turned into a general assignment).

out of the surplus," unless it be disposed of by the husband during life.

The law does not undertake to secure that surplus for her; she must look to it, at least where the husband had only an equity;⁸ even where he held the legal title the wife need not be made a party to a suit for enforcing a lien superior to her dower, and, unless there be collusion, the judicial sale will result in a title free of dower. The words are, "out of the surplus," not "in proportion to the surplus," and she might under these words have dower on the value of the whole land as far as the surplus will pay it. However, where the land is not fully paid for, and subject to the vendor's lien, the custom of the courts is to allow dower in proportion to the surplus only. Where dowerable lands and goods are embraced in the same mortgage, the widow who has joined in it may insist that the goods be first exhausted, so as to save her dower.⁹ But where the land must be sold in order to pay the mortgage, the dower will be calculated on the surplus only.¹⁰

The allowance of dower in money is quite common. Where the land is sold under a superior lien or mortgage the widow's assent is not needed; in many other cases she takes the money value by her free consent. It is calculated upon Dr. Wigglesworth's Table of Mortality at 6 per cent interest; the table is found on pages 14 and 15 of Vol. III of Bush's Reports.¹¹ An early case was decided, not only in opposition to the rule that purchase money is superior to dower, but to the rulings in England, New York, and Massachusetts as to denial of dower to the wife of a husband, who is a "conduit" for the estate. A. conveyed land to B. with the understanding (which was carried out) that he should convey to C. in trust to sell and pay some joint debts of A. and B. and some debts of B. only. B. died,

⁸ *Tisdale v. Risk*, 7 Bush, 139; intimating that she might, even during coverture, take steps to secure her dower. (See Gen. Stat., Ch. 52, Art. IV, Sec. 5.)

⁹ *Harrow v. Johnson*, 3 Met. 578, 581.

¹⁰ *Fichtner v. Fichtner's assignee*,

10 Ky. L. R. 924. (See *supra*, Sec. 77, nn. 15 and 16. For table of inchoate dowers see also B. and F. Gen. Stat., 738.)

¹¹ Approved in *O'Donnell v. O'Donnell*, 3 Bush, 216, and *Alexander's ex'x v. Bradley*, page 667.

and dower was allowed to his wife in preference to the creditors, on the ground that B. held "beneficially."¹²

II. On "election" the statute says, in Article IV, Section 6: "A conveyance or devise of personal or real estate by way of jointure may bar the wife's dower, but if made before marriage without her consent, or during her infancy, or after marriage, she may, within twelve months after her husband's death, waive the jointure by written relinquishment acknowledged and proved, etc., and have her dower."

In such a case the estate granted or devised goes to the donor or his heirs or representatives. This provision goes hand in hand with a section of the Statute of Descent, allowing the widow twelve months after probate within which to renounce the will by an instrument, to be recorded like a deed.¹³

A court of equity, however, may extend this statutory term of twelve months, at the instance of the widow, where by reason of litigation between the executor and pretended creditors, the result of which she can not foresee, it becomes impossible for her to make an intelligent choice within that time,¹⁴ and may permit her to make a conditional election.

But the statute above quoted is deemed to bear so far against the widow that, unless the will shows an intent to let her have the dower in addition to the devises, she will be put to her election;¹⁵ while at common law the presumption was in favor of both dower and devise, unless the contrary intent was made to appear.

A will, not renounced in time, giving to the wife all the husband's estate (which by reason of debts turns out worthless), is incompatible with her recovery of dower in lands which, without her valid consent, he had conveyed away during coverture;¹⁶ nor can she be aided under the re-enactment

¹² *Tevis v. Steel*, 4 Mon. 339, will hardly be followed.

¹³ Gen. Stat., Ch. 31, Sec. 12.

¹⁴ *Smither v. Smither's ex'r.* 9 Bush, 280. The court tries to limit the effect of its judgment, so as not to set it up as a sweeping precedent, overruling

Nicholas v. Nicholas, Pr. Dec. 338.

¹⁵ *Huhlein v. Huhlein*, 87 Ky. 247. In *Hin-on v. Ennis*, 81 Ky. 363, a devise of one third of the lands, subject to debts, was held to postpone the dower to them.

¹⁶ *Grider v. Eubanks*, 12 Bush, 510.

of the act of 27 Henry VIII, Chapter 10,¹⁷ which directs that "where the wife is lawfully deprived of her jointure she shall have indemnity therefor by way of dower . . . out of her husband's estate," for the lands sold by the husband are no longer his estate.

But the clause which allows to the wife an election of dower and distributive share against a post-nuptial jointure has been construed as not applicable to articles of separation made between husband and wife and her trustee, by which she agreed to take certain property and rents in full of all her rights.¹⁸

III. *Basis of Value.* "Whether the recovery is against the heir or devisee, or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee, or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land."¹⁹ The clause is copied literally from the Revised Statutes. It was construed in 1866 as not materially changing the common law rule. The change in value by the general rise or fall of land is not contemplated at all, but only such as comes from "permanent improvements he has made." Consider the land as if it had not been improved, then allot to the widow as much of the land as it is in yearly value, as one third of the land, without the improvements, would be worth.²⁰

Where the widow, without authority to charge the infant heirs, had put improvements on the descended land out of her own means, and thereafter asked for an allotment of dower, the same privilege was granted to her that a purchaser would under the above quoted clause enjoy as against the widow; that is, the court ordered that part of the land which she had improved to be allotted for her dower, not charging her with the value of the improvements.²¹

IV. *Quarantine and Back Rents.* "The wife shall be

¹⁷ Gen. Stat., Ch. 52, Art. IV, Sec. 9.

¹⁸ Loud v. Loud, 4 Bush, 453. The case is somewhat weakened as a precedent, by its laying stress on the fact that the wife was at fault.

¹⁹ Gen. Stat., Ch. 52, Art. IV, Sec. 9.

²⁰ Fritz v. Tudor, 1 Bush, 28.

²¹ Allsmiller v. Fruechtenicht, 86 Ky. 198.

entitled to one third of the rents and profits of her husband's dowable real estate from his death until dower is assigned, and she shall hold the mansion house, yard, garden, the stable and lot in which it stands, and an orchard, if there is one adjoining the premises aforesaid, without charge to her, until dower is assigned to her."²² But if the widow leaves the mansion and curtilage "unoccupied and uncontrolled," and the heirs occupy it, she is entitled to only one third of its rental value, just as in other lands.²³ And a woman separated from the husband by a divorce, from bed and board, and not inhabiting his house at the time of his death, has no quarantine.²⁴

By the next following section of the statute the rent against the heir or devisee is limited to five years before action; against one claiming by purchase from the husband, rent is allowed only from the beginning of the suit for dower. If she dies before recovery, the rent goes to her personal representative.

The doctrine of fraud on marital rights will be discussed under the head of Fraudulent Conveyances.

SEC. 89. JOINT ESTATES. For some purposes the old distinctions between tenancy in common, coparcenary, and joint tenancy have been kept up in Kentucky, perhaps to the present day. (See *infra* in chapter on *Limitation of Actions for Land*.) But an act of 1796 abolished survivorship among joint tenants in such sweeping language that the Court of Appeals felt compelled to extend the new rule to joint trustees, where it caused much embarrassment, as upon the death of one of several trustees the legal title would often fall upon a number of infants, married women, and non-residents.¹

But in the Revised and General Statutes, after a section abolishing the right of survivorship in other cases, it is restored as to executors and trustees, and it shall also be given

²² Gen. Stat., Ch. 52, Art. IV, Sec. 8, taken through Rev. Stat. from a dower act of 1796. (See *M. and B.*, I, 573.)

²³ *Burk's heirs v. Osborn*, 9 B. M. 579.

²⁴ *Rich v. Rich*, 7 Bush, 58.

¹ *M. and B. Stat.*, II, 876; *Litt. Laws Ky.*, I, 510; applied to trustees in *Saunders' heirs v. Morrison's ex'rs*, 7 Mon. 54.

whenever an intention to let an estate survive to the last liver is made apparent by the deed or will.² In other words, it is competent for a grantor or deviser to confer upon two or more persons such an estate as a joint tenancy was at common law.

But while the act of 1796 was extended to trustees, it was deemed inapplicable to the tenancy of land given to husband and wife, who hold not by "joint tenancy," but "by the entirety." Hence an estate given by the grantor to his daughter and her husband in 1837 became, upon the death of the daughter in 1861, the sole property of the husband.³

But the Revised Statutes, while not affecting these estates "in frank-marriage," if we may so term them, that were created before their adoption, change all grants or devises made since their enactment to a husband and wife into a tenancy "in common" between them, each owning one half, unless, indeed, a right of survivorship has been expressly provided for.

The right of a part owner to partition, either in kind or by sale and division of the proceeds, is the same for joint tenants, coparceners, and tenants in common. And one part owner who has at his own expense, with the acquiescence of his fellows, put valuable improvements upon a part of the tract, should in a partition have that part of the tract allotted to him, without being charged with the value of such improvements.⁴

Before the Codes of Practice, tenants in common suing for land had to lay several demises, and might, if they chose, bring separate suits for their respective shares, but under the new practice a joint suit by several tenants in common was allowed without any question on that score,⁵ and it is doubtful whether separate suits would now be tolerated.

The doctrine by which the real estate of a partnership is

² Gen. Stat., Ch. 68, Art. I, Sec. 14, copied from the Rev. Stat., Sec. 13 having abrogated survivorship.

³ Elliot v. Nichols, 4 Bush, 502; the clause in the Rev. Stat. was held not to act retrospectively, following Rog-

ers v. Grider, 1 Dana, 243, and Croan v. Joyce, 3 Bush, 454.

⁴ Kenton Insurance Co. v. Wigginton, 11 Ky. Law Rep. 539.

⁵ Woolfolk v. Ashby, 2 Metc. 288, comp. Craig v. Taylor, 6 B. M. 457.

in equity treated as personal assets is fully recognized⁶ (even as to a firm of lawyers who take land for a fee),⁷ whether the title is held by all or by one or more of the partners,⁸ and the wives of the owners have no dower.⁹ But where the legal estate of one of the partners descends on an infant, though it be subject to the trust in favor of the partnership and of its creditors, it can not be extinguished except by following the statutory forms as to infants' lands.¹⁰

SEC. 90. LEASES. Two important changes have been made by Kentucky statutes in leases for years, and in those "from year to year."

First, it is an implied condition in every lease for a term of less than two years, that every transfer or assignment by the tenant of his interest, or any part thereof, without the written consent of the landlord, operates a forfeiture.¹

Second, and what is more important, the General Statutes abrogate the old well-known tenancy from year to year, which continued on the tenancy indefinitely, unless the landlord or the tenant gave a *previous* notice to the other, and substitutes therefor an article which provides that "if by contract a term or tenancy for a year or more is to expire on a certain day," and without an express contract the tenant shall hold over, "he shall not thereby acquire any right to hold or remain on the premises for ninety days after said day, and the possession may be recovered without demand or notice if proceedings are instituted within said time. But if proceedings are not instituted within said time, then none shall be allowed until the expiration of one year from the day the term . . . expired," and so on from year to year;² the tenant holding over for less than ninety days being no more bound to stay than the landlord to keep him.³ This makes holdings from

⁶ *Divine v. Mitchum*, 4 B. M. 488; *Buck v. Winn*, 11 B. M. 322; *Cornwall v. Cornwall*, 6 Bush, 372; *Bank of Louisville v. Hall*, 8 Bush, 676; *Spalding v. Wilson*, 80 Ky. 589.

⁷ *Flannagan v. Shuck*, 82 Ky. 617.

⁸ *Pepper v. Thomas*, 85 Ky. 539.

⁹ *Galbraith v. Gedge*, 16 B. M. 681.

¹⁰ *Cornwall v. Cornwall*, 6 Bush, 369. If only part of the heirs were infants, and the land not susceptible of division, proceedings under Sec. 543 of the old Code would have been in place.

¹ Gen. Stat., Ch. 66, Art. I, Sec. 2.

² *Ibid.*, Art. IV.

³ *Mendel v. Hall*, 13 Bush, 232.

year to year in Kentucky different from what they are anywhere else, and renders all the old learning on the subject worthless.

The English statutes for securing landlords in their rents, are re-enacted in the main :

1. *Double rent.* A tenant who fails to quit possession at the time specified in his own notice, or at the expiration of his term, or, having agreed to waive notice, does not deliver possession on demand, is bound for double rent, to be recovered "in same manner as original rent."⁴ The enactment was held to be not penal, but compensatory, and was not construed narrowly. The plaintiff need not prove a demand and refusal on the very day when the possession became tortious ; and on a later day there may be a refusal without a formal demand. The double rent is recoverable from the time of refusal.⁵ But a mere holding over after a specified term is not a refusal to give possession ; there must be either a demand or some act on the part of the tenant that amounts to a purposed refusal.⁶

2. "*Rent shall bear six per cent per annum interest from the time it is due.*"⁷ But *mesne* profits are not rent, and no interest can be allowed on them.⁸

3. *The landlord's lien* and the liability of a sheriff who levies on goods for the rent of the premises will be treated among liens on personal property.

4. There are the usual provisions against the loss of rent by the effect of death or accident ; the same remedies on a lease for life as on a lease for years ; the death of the *cestui que vie*, during whose life land is held, or of the wife, through whom the husband claims rent, does not hinder the remedy, and the alienee as well as the personal representative of the landlord has all his remedies for rent in arrear at his death, and the remedies for the recovery of the rent are also given

⁴ Gen. Stat., Ch. 66, Art. I, Sec. 8.

Bush, 176—a case of forcible detainer.

⁵ *Beynroth v. Mandeville*, 5 Bush, 584.

⁷ Gen. Stat., Ch. 66, Art. II, Sec. 3.

⁶ *Thompson v. Marsh*, 4 Bush, 424, relying on *Shepherd v. Thompson*, 2

⁸ *Calvert v. Moore*, 6. Bush, 856, 360.

against the assignee or under tenant of the lessee, or his personal representative;⁹ and the right of distraint is not lost by the expiration of the lease.¹⁰ And where a distress is made for rent justly due, subsequent irregularities do not make the landlord a trespasser *ab initio*.¹¹ There is also the usual extension of the remedy for waste, including the obsolete provision for treble damages, and for losing "the thing wasted."¹²

5. A warrant of distress must be sworn out before a magistrate and served by a constable; it is only allowed for rent reserved in money; it may be levied on goods and chattels not found upon the premises, but belonging to the tenant anywhere in the county, and on the goods of an under tenant found on the premises. The proceedings are governed in part by the General Statutes, in part by the Code.¹³ In some cases the landlord may have an attachment for rent due or not due, and reserved in money or otherwise.¹⁴

Clauses forfeiting a lease, or giving a re-entry for non-payment of rent, are relieved against even after the landlord has re-entered, "if the tenant shall have acted in good faith and shall promptly pay the rent when demanded, or before the landlord shall have suffered loss or unreasonable inconvenience from the delinquency."¹⁵

Where the rented premises are destroyed by fire or other unavoidable accident, without the fault of either party, the Kentucky rule is that the lease is not thereby broken; the loss of the "term" falls on the tenant, and his covenant or promise to pay rent is unaffected. The point was first decided in the case of a hired slave,¹⁶ but was declared to govern the leasing

⁹ Gen. Stat., Ch. 66, Art. II, Secs. 7, 8, 19, 20, 21, 22.

¹⁰ *Ibid.*, Sec. 10; at least this is the evident intent of the section, although by mistake it says "not ended," instead of "ended."

¹¹ *Ibid.*, Art. II, Sec. 17.

¹² *Ibid.*, Art. III, Sec. 1.

¹³ *Ibid.*, Art. II, Sec. 4; C. P., Secs. 645-659.

¹⁴ *Ibid.*, Secs. 5, 6, adopted by C. P., Sec. 195.

¹⁵ Jones v. Wilson, 1 Bush, 173, 174. And most magistrates are in the habit of dismissing warrants of forcible detainer, taken on the ground of forfeiture for non-payment of rent, upon the payment of the rent and costs.

¹⁶ Redding v. Hall, 1 Bibb, 536.

of houses, and it was so applied in 1870,¹⁷ the court stating that there were many other precedents, which, however, are not reported.¹⁸ Covenants to repair were construed with the same harshness till the statute¹⁹ stepped in, declaring that unless the contrary be expressed the tenant shall not be bound for destruction by fire or other casualty without his fault or neglect.

The *law of fixtures* between landlord and tenant is not touched by the statute. As already shown, the tenant's rights may be strengthened by a parol agreement,²⁰ and from a remark in the case cited it would appear that in the absence of an agreement an outgoing tenant would hardly be allowed to remove any houses as "tenant's fixtures," as the Supreme Court of the United States allowed a dairyman to do in *Van Ness v. Pacard*.

The rule that the tenant must remove his own fixtures before the end of his tenancy is fully insisted on,²¹ and a forfeiture of the lease by non-payment of rent puts an end to the tenancy as much as the expiration of the term.

A guardian may lease the lands of the ward till he comes of age, not making any lease for more than seven years, and he may accept on behalf of the ward as tenant the renewal of a beneficial lease.²²

NOTE.—The General Statutes provide (Ch. 66, Art. VI, Sec. 1) that "a tenancy at will or by *sufferance* may be terminated by the landlord giving one month's notice in writing." As to a tenancy at sufferance this can not be taken as excluding the landlord's right to expel the tenant at once without contradicting Article IV, already quoted, unless we restrict this privilege to a tenant who has, after the expiration of his term, been allowed to pay monthly rent.

¹⁷ *Helburn v. Mofford*, 7 Bush, 169, 174, where it is admitted that a different rule prevails in New York, Massachusetts, and some other States. In this case the court unaccountably overlooked the point that the landlord had taken possession of the lot for the purpose of rebuilding, which is an eviction, and would on that ground discharge the tenant. It has, since the decision in this case, become usual to put into printed

leases a proviso that the tenant may avoid the lease if the premise be destroyed, etc., without his fault.

¹⁸ In *Harrison v. Murrell*, 5 Mon. 359, the rule is spoken of *arguendo*, it being the case of a slave.

¹⁹ Now Gen. Stat., Ch. 63, Sec. 26.

²⁰ *Gray v. Oyler*, 2 Bush, 256; see *supra*, Sec. 83, n. 9^a.

²¹ *Thomas v. Crout*, 5 Bush, 89.

²² G. St., Chap. 48, Art. II, Sec. 6.

SEC. 91. THE HOMESTEAD. An act of February 10, 1866,¹ re-enacted with some amendments in the General Statutes,² secures to an "actual *bona fide* housekeeper, with a family, of this Commonwealth" a homestead "not to exceed in value one thousand dollars," against creditors, and to the widow or widower and infant children of the deceased owner to a certain extent also against the other heirs or devisees. The law has given rise to much litigation. The following questions, in the main, have to be answered:

I. *Who is entitled to a homestead exemption in his own right?*

The act of 1866, was by Section 6, made to apply "only to white persons who are *bona fide* housekeepers with a family." The discrimination as to color, becoming unconstitutional by the fourteenth amendment, was dropped in the General Statutes, and Section 16 of the Article embracing the homestead law applies "to all persons of any race or color who are actual *bona fide* housekeepers," and an act of March 15, 1876, added the words "with a family." Both requirements, that of a "housekeeper and of his being with a family," have been very liberally construed. A widower, living, cooking, and eating at his office, and leaving his young daughters mainly in charge of his mother, was held to be a housekeeper within the meaning of another exemption law,³ nor is such character lost by a temporary estrangement between husband and wife, causing the former to leave the house.⁴ A widower or widow having children of full age, or one who supports brothers or sisters at his or her home, is "with a family,"⁵ and so is the father of an illegitimate child who recognizes him and brings him up at his home.⁶ A negro who had as a slave contracted a "customary marriage" was recognized as a housekeeper with a family, though he registered himself and wife

¹ Myers' Suppl., p. 715 (came into effect June 1, 1886).

² Gen. Stat., Ch. 38, Art. XIII, Secs. 9-16, amended March 15, 1876; see B. and F.'s edition. The differences are indicated in the text.

³ Seaton v. Marshall, 6 Bush, 429

(case of personal property).

⁴ Carrington v. Herrin, 4 Bush, 624.

⁵ Brooks v. Collins, 11 Bush, 622; McMurray v. Shuck, 6 Bush, 111.

⁶ Bell v. Keach, 80 Ky. 42 (case of personal property).

under the statute of 1866 as married, after his creditor had acquired a lien.⁷

II. *As against what debts?*

The Commonwealth, not being named in the act, was held not to be bound, and the homestead was denied to the sheriff as against an execution in favor of the Commonwealth for revenue collected, and would have been denied to his sureties.⁸ But as, under the Criminal Code, bail must justify by showing a given amount of property *not exempt* from execution, the homestead exemption holds good against a forfeited bail bond; also against fines and costs.⁹ By its terms the law applies only to "debts or liabilities created or incurred after June 1, 1866," and not to any demands "for the purchase money of the homestead," nor "if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon." As to "a mortgage given by the owner," the exception is limited in another part of the law, of which hereafter. Where a new note is given for an old debt, its rank is not thereby affected,¹⁰ even where an assignee of the old demand accepts a new note and mortgage to himself,¹¹ or a friend furnishing money for a preferred claim takes up the evidence of debt for his indemnity,¹² and a note for purchase money, though it be given to a person other than the vendor, and be not secured by lien, is superior to the homestead.¹³ A liability

⁷ Dowd and wife v. Hurley, 78 Ky. 260.

⁸ Commonwealth v. Cook, 8 Bush, 220.

⁹ Commonwealth v. Lay, 12 Bush, 284. No reason is given for the lower rank of fines and costs.

¹⁰ Marsh v. Alford, 5 Bush., 392; Pryor v. Smith, 4 Bush, 379, 383; Kibby v. Jones, 7 Bush, 243; see *supra*, Sec. 8. Cases of debts created before June, 1866, are now obsolete, but the same reasoning applies to debts created before the purchase of the homestead.

¹¹ Bradley v. Curtis, 79 Ky. 327.

The waiver of the vendor's rights was held to be a question of intention upon all the facts, and a mortgage on the homestead, though not enforceable as such for want of the wife's signature, showed the intent not to waive the priority.

¹² Dudley v. Goddard, 11 Ky. Law Rep. 480. *Aliter*, where the plaintiff has lent money to discharge a superior demand, without asking for indemnity. (White's adm'r v. Curd, 86 Ky. 191).

¹³ Greer v. Oldham, 10 Ky. Law Rep. 889. And any responsibility, even that of a married woman, en-

for a tort dates from its commission, and costs, though disproportionate, rank with the demand.¹⁴

The word "purchase" is taken literally; the debtor can not withhold from his existing creditors his means by buying a homestead, but a homestead which he inherits,¹⁵ or obtains by exchange for another, or out of the proceeds of sale of another, that was exempt,¹⁶ is not withdrawn from his available assets, and he may hold it against a prior debt. But where the debtor sold his Kentucky homestead, moved to another State, bought a home there, sold it again, returned to Kentucky and bought another homestead, this last one, though its price was traced to the proceeds of the first, was subjected to a debt contracted after the sale of the first.¹⁷ Where the dwelling house is in the course of erection, but not yet habitable or occupied, a demand arising in the meantime has priority.¹⁸ However, the exemption is good against a demand created after the homestead is purchased and built up, but before it is occupied.¹⁹ The sanctity of the claims for purchase money has lately been carried so far that where the vendee of one farm, for which he had not paid, sold it and invested the proceeds in a homestead, the latter was subjected to the unpaid price of the first.^{19a}

Where a tract embracing the dwelling house of the debtor is subjected to the payment *pro rata* of several demands, some of which would and some of which would not overreach the homestead right, the opinion now is that the debtor must have his full \$1,000 in land or money, unless the claims superior to

forcible against her land only that is connected with the purchase of the home tract, will be enforced, if only on the ground that it antedates the homestead.

¹⁴ Knight v. Whitman, 6 Bush, 51.

¹⁵ Jewell v. Clark, 78 Ky. 398.

¹⁶ Thompson v. Heffner, 11 Bush, 364; Musgrave v. Parish, — Ky. Law Rep. 998.

¹⁷ Caldwell v. Seivers, 85 Ky. 88.

¹⁸ Hansford v. Holdam, 14 Bush, 210; Fish v. Hunt, 81 Ky. 584. But

when a dwelling stands complete, the price to be paid for additions to it is subordinate to the homestead right. (Roberts v. Riggs & Smith, 84 Ky. 251.)

¹⁹ Nichols v. Sennitt, 78 Ky. 630. The fact that a demand is prior to purchase or erection, or for purchase money, must come from the creditor, and need not be denied in homesteader's pleading.

^{19a} Hopkins v. Noel's adm'r, 11 Ky. Law Rep. 37.

the homestead right can not be paid without taking it from him, though at one time two of the four judges held that the debtor should have only such a proportion of the \$1,000 as the debts ranking below the homestead right bear to the whole indebtedness.²⁰

III. *What is a homestead?*

The words of the statute in its first and operative clause, aside from later references to the homestead, are: "So much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value \$1,000." Land on which the debtor has not his dwelling is not exempt.²¹ A mere intention to live on the homestead is not enough, and if, while it is occupied and cultivated by a tenant, the owner lives at another place, making that his home, he can not save the homestead by returning to it after executions have become a lien; *a fortiori*, if he occupies it only after an execution sale.²² So, where a debtor not living on his own land made a general assignment, reserving his homestead right, and afterward moved on the home place descended to him, it was too late, and the reservation did not avail him.²³

But in a late case (1889) a son moving on an inherited farm, four months after his father's death and ten days after its allotment to him, was allowed to hold it against intermediate execution sales, on the ground that he had begun to occupy it without unreasonable delay.²⁴

²⁰ Webster v. Bronston, 5 Bush, 523 (divided court); Gardner v. Smith, 10 Bush, 245.

²¹ Brown v. Martin, 4 Bush, 47, with query "whether a habitable tenement on the premises is in all cases necessary, etc." Nor can other land be exempted because the true homestead is effectually mortgaged (Jarboe v. Colvin, 4 Bush, 70.) But where the debtor had sold (for debt) the part of his farm containing the dwelling house, but remaining in it as a tenant went on to cultivate the unsold part, he was allowed a homestead out of it, though he did not build a

cabin and move on it till after an execution sale.

²² Carter v. Goodman, 11 Bush, 228; Fant v. Talbot, 8 Ky. 23. In Hansford v. Holdam *supra* it was said that a mere intention is not enough. Where a professional man moved temporarily from his town residence to his wife's farm, he was held not to have abandoned the former as his homestead. (Black v. Black's adm'r, 11 Ky. Law Rep. 378.)

²³ Creager v. Creager, 87 Ky 449.

²⁴ Miller v. Bennett, 11 Ky. Law Rep. 391.

The life tenant or owner by title bond of a home has his homestead right, the question of a holder for a term of years being left undecided.²⁵ Where a part of the home tract is condemned for public use, the money paid for it, if it does not run the aggregate when added to the remaining land to more than the limit, is exempt from attachment.²⁶ Where a farm is made up of several contiguous tracts, held by different titles, it is deemed one for the purposes of the homestead law.

IV. *What is the measure of the owner's homestead right?*

The upper limit of one thousand dollars being given in the first clause of the law, it is directed thereafter that the officer holding the execution or ²⁷ the court shall cause the part to be selected by the defendant, not exceeding one thousand dollars in value, to be laid off, and provides for its appraisement; but where the land "is not divisible without great diminution" it shall be sold, and out of the proceeds a thousand dollars shall be paid to the defendant, to enable him to purchase another homestead."

When the home tract is worth less than this sum, it must not be sold; if sold, and less is offered, there "shall be no sale;" that is, no title will pass.²⁸ The owner's homestead right is not a mere life estate, subject to which the land might be sold, and the court will not interfere with the use which the debtor may make of his one thousand dollars; should he invest them in something else than a homestead, such thing would be liable to the demands of his creditors generally, and not specially to the creditor from whose grasp the sum had been withdrawn.²⁹

Where the husband and wife are joint owners of the home tract, the former may have land enough laid off to make his own interest therein worth one thousand dollars.³⁰ But where the owner has a life estate in the tract, it seems that he can

²⁵ *Anderson v. Anderson*, 80 Ky. 636; *Griffin v. Proctor*, 14 Bush, 571; *Percifull v. Hind*, 10 Ky. L. R. 880.

²⁶ And so of insurance money for a burnt homestead. (*Bernheim v. Davitt*, 9 K. L. R., 229.)

²⁷ The Gen. Stat. by misenrollment

have at for or.

²⁸ *Passim*: strongest case is *Miller v. Bennett* (n. 24).

²⁹ *Lear v. Totten*, 14 Bush, 101.

³⁰ *Johnson v. Kessler*, 87 Ky. 458 (otherwise as to widow's homestead, *infra*).

only claim as much land as in fee is worth that sum, the law securing to the debtor only "a humble home."³¹

V. *What rights survive to the widow and infant children?*

The present law reads: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age. But the termination of the widow's occupancy shall not affect the right of the children; but said land may be sold subject to the right of said widow and children, if a sale is necessary to pay the debts of the husband" (Section 14). The next section gives reciprocal rights to the surviving husband and children of a woman owning the homestead.

This is in addition to a preceding clause already contained in the older law:

"And such exemption shall continue after the death of the *defendant* for the benefit of his widow and children, but shall be estimated in allotting dower." The new section given above rather diminishes the widow's rights from a life estate to a right of occupancy,³² and gives it to her and to the infant unmarried children, clearly not only against creditors, but also against other heirs and devisees.³³ This right of occupancy, however, has been treated so liberally as to make it practically a life estate. Should the widow rent out the premises and put her tenant in possession, it is not deemed an abandonment; though, if her husband had done so as owner, his homestead right would have been lost.³⁴ And where the home tract is sold a thousand dollars will be invested for her for life, or she may take the table value of her life estate in it.³⁵ In the case

³¹ Syllabus of *Franks v. Lucas*, 14 Bush, 395; hardly hinted at in the opinion. Probably shown by the record.

³² Remark to this effect in *Miles v. Hall*, 12 Bush, 106.

³³ *Eustache v. Rodaquet*, 11 Bush, 46. This right did not exist under the act of 1866. (*Little v. Woodward*, 14 Bush, 555.)

³⁴ *Acton v. Phipps*, 12 Bush, 375 (377), not necessary for a decision, as she had a son of fourteen, whose rights are saved by the words of the statute. But actually decided in *Sansberry v. Simm's adm'x*, 79 Ky. 527.

³⁵ *Sansberry v. Simm's, etc.* A decree awarding her \$1,000 absolutely was reversed.

last quoted, it was held that a devise to the widow by her husband of other lands could not affect the measure of her widow's homestead, though it had been decided shortly before that where she has an undivided interest in her own right in the home tract such interest must be included in the aggregate of a thousand dollars in value.³⁶ Of course, against her own creditors, the widow has the full rights of a homestead owner in such lands as the husband may have devised to her.³⁷ In a very late decision it was held, that the debtor owning the homestead can by will give it in fee to an infant child, and thereby enable the child to hold it free from the father's creditors in fee, instead of holding it only to the age of twenty-one.^{37a}

VI. *How can the homestead right be barred?*

"No mortgage, release, or waiver of such exemption shall be valid unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as mortgages of real estate." Whether a widowed housekeeper can by his mortgage destroy the homestead rights of his children, has never come up for judgment, but the death of a wife who has not joined, before the husband, would not make his mortgage good against his children.³⁸ A mortgage in which the wife joins as grantor, need not specify the homestead right;³⁹ but should the deed or acknowledgment show that she only meant to bar dower, or should her signature be appended to a mortgage in which she is not a grantor, it will avail nothing.⁴⁰ An assignment for the benefit of creditors,⁴¹ or even an absolute deed, which was among the parties treated as a mortgage,⁴² or the mortgage of land held by title bond⁴³ requires the wife's signature; but where the husband

³⁶ *Miles v. Hall*, 12 Bush, 109.

³⁷ *Allensworth v. Kimbrough*, 79 Ky. 332.

^{37a} *Myers' g'dian v. Myers' adm'r*, 11 Ky. Law Rep. 659.

³⁸ *Derr v. Wilson*, 84 Ky. (*Dictum*.)

³⁹ *Robbins v. Cookendorfer*, 10 Bush, 609; *Herbert v. Kenton B. and L. Ass.*, 11 Bush, 296, 304. A homestead belonging to the wife can be

barred in like manner by her and her husband's mortgage. (*Drye v. Cook*, 14 Bush, 459.)

⁴⁰ *McGrath v. Berry*, 13 Bush, 391. Compare *Prather v. McDowell*, in the matter of dower.

⁴¹ *Hemphill v. Haas*, 11 Ky. Law Rep. 62.

⁴² *Hayden v. Robinson*, 83 Ky. 615.

⁴³ *Griffin v. Proctor*, 14 Bush, 571.

sells his home tract out and out, though his wife do not join, the homestead right is gone.⁴⁴

The mortgage made by a married owner without his wife's co-operation is to the extent of the homestead right wholly invalid, even after his death; and, subject to the life estate of the widow, the mortgagee can not enforce his encumbrance, but the homestead will be held against him by one to whom the owner has sold it after the mortgage, or left it by will.⁴⁵

Of course, a mortgage made by a husband and wife subjects the homestead only to the favored creditor, and does not throw it open to the demands of others; the next one thousand dollars after satisfying the mortgage goes to the debtor.⁴⁶

VII. *What judgment of a court will bar a homestead?*

This is the most difficult question under the homestead law, and the decisions upon it are harder to harmonize than on any other.

The statute contemplates that after the judgment of a court which orders the homestead to be sold, and before the sale, the homestead may be laid off. It would therefore seem that the judgment to sell, whether against the debtor alone, or against husband and wife, unless the question of homestead had been litigated, can not conclude any thing. And further, as the wife must join in a mortgage in order to waive the homestead right, and as she has an interest in the homestead while sharing it with her husband,⁴⁷ and a distinct right after his death, it would seem that there can be no estoppel by judgment unless she is party. But while in some cases the loss of the homestead was regarded as *res judicata* in spite of these considerations, in other cases repeated judgments and orders seemed to be unavailing to secure the creditor in the proceeds of the condemned homestead. The decisions under this head,

⁴⁴ *Brame v. Craig*, 12 Bush, 404, where it is remarked that in some other States this point is ruled otherwise.

⁴⁵ *Lear v. Totten*, 14 Bush, 101; *Tony v. Eifort*, 80 Ky. 152.

⁴⁶ *McTaggart v. Smith*, 14 Bush, 414.

⁴⁷ *Hemphill v. Haas*, 11 Ky. Law Rep. 62. In the husband's lifetime the wife may sue alone if he refuses to join.

both on the side of the estoppel⁴⁸ and against it,⁴⁹ are given in foot notes.

VIII. *What is the effect of a fraudulent deed or of a preference?*

As the homestead (within the limit of value) is not subject to the demands of creditors, a transfer of it, by gift or otherwise, though fraudulent in intent, can not be set aside.⁵⁰

And as no other creditor is "excluded," if the insolvent owner gives it by preference to one of his creditors, it seems

⁴⁸ *Wylie v. Harpending*, 13 Bush, 158: mortgage by husband (owner) and wife; latter's acknowledgment claimed to be faulty; in a suit on the mortgage against both there was a decree of sale by default. The husband died, and to a motion to revive the decree widow and infant children interposed the homestead right; held, they came too late. *Derr v. Wilson*, 84 Ky. 14: mortgage not signed by wife; after his death, in a suit to enforce it, the Chancellor decreed a sale, subject to estate of debtor for life, and of his infant son during infancy. Mortgagee bought the remainder estate. Though the decree was said to be erroneous, the purchaser was allowed to recover on it from the son. *Snapp v. Snapp*, 87 Ky. 554: grantee from debtor, litigated in a suit to which he was a party (but *his wife*, it seems, *was not*) with purchasers under execution, the question whether the grant was fraudulent against creditors, and was defeated by them. Husband and wife afterward petitioning for their homestead right were held estopped, as their right might have been shown in support of the grant. Following *Gideon v. Struve* (see n. 52). *Hill v. Lancaster*, 10 Ky. Law Rep. 954 (to be reported): after judgment setting aside a conveyance of land as

fraudulent, in a suit to which the debtor-owner's wife was not a party, she joined with her husband at a subsequent term in a petition for the homestead right; held, she was estopped, on the ground given above, though their course seems to be exactly that contemplated by the statute.

⁴⁹ *Wing v. Hayden*, 10 Bush, 276: a mortgage made by the debtor alone was enforced by decree of sale, the wife not being a party, and he having defended the suit on other grounds. The homestead was sold under it, and bought by the mortgagees. Husband and wife were allowed to recover it afterward. It was also *held*, that the purchaser bought subject to the exemption, and could not gain any thing by the debtor's afterward ceasing to be a housekeeper. *Crout v. Sauter*, 13 Bush, 442: mortgage of dwelling house without joinder of wife; decree of sale, wife not being a party to the suit; mortgagor bought at sale, but failed to pay the sale bonds, and surrendered the house for re-sale; the mortgagee then bid in the homestead at \$1,000; the sale was confirmed; then the debtor moved to set aside the confirmation; held to be in time.

⁵⁰ *Dowd v. Hurley*, 78 Ky. 184; *Knevan v. Speckert*, 11 Bush, 1.

that no suit can be brought to turn such attempted preference into a general assignment, and such suit can be defeated without pleading the homestead right; for when this right is shown the denial of the intent to exclude the other creditors from any thing within their reach is sustained.⁵¹ Hence, if a conveyance by husband and wife is once condemned as fraudulent, or as a preference (in a suit to which they are parties), they are concluded, and can not thereafter assert a claim to a homestead in it.⁵²

⁵¹ *Lisby v. Perry*, 6 Bush, 515.

⁵² *Gideon v. Struve*, 78 Ky. 184.

Qu. Why could they not consist-

ently claim the exemption, if the tract was worth more than \$1,000? And see above, note 48.

CHAPTER XIV.

ENCUMBRANCES AND EASEMENTS.

SEC. 92. The Vendor's Lien.

SEC. 93. Mortgages.

SEC. 94. The Mechanic's Lien.

SEC. 95. Liens by Process of Law.

SEC. 96. Sub-Purchasers.

SEC. 97. Rights of Way.

SEC. 98. Other Easements.

SECTION 92. THE VENDOR'S LIEN. While in England, and in nearly all the other States, a vendor's lien is a thing rarely thought of, it is in Kentucky the ordinary method of securing the deferred portions of the purchase money in land; in fact a mortgage is never taken, unless it be to comply with the whim or the necessities of a non-resident seller.

The General Statutes change the common law rule slightly by the following provision :

“When any real estate shall be conveyed, and the consideration or any part thereof remains unpaid, the grantor shall not have a lien for the same against *bona fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid.”¹

It is the common practice in Kentucky to draw deeds with a consideration clause of the following form :

“In consideration of — dollars, paid and to be paid as follows, \$ — in cash, and the notes of (the grantor) for \$ — (describing the notes),” and this is enough to satisfy either the statute or the old equity rule. But it is usual to add something like the further words, “for the securing of

¹ Ch. 68, Art. I, Sec. 24. But between the original parties the lien can be enforced, though not expressed in the deed. (*Ross v. Adams*, 13 Bush, 870.)

which notes a lien is hereby retained." And such a clause becomes of importance if the deed should fail to state clearly what portion of the purchase money is unpaid, for it would establish a contract lien independent of either statute or usage.² The corresponding clause of the Revised Statutes³ did not contain the words "against *bona fide* creditors and purchasers;" and it moreover requires that it be "*expressly* stated in the deed," while the word "*expressly*" is left out in the later revision. The omission of this word makes it somewhat doubtful how far the former decisions will apply. One of these was, that a stipulation for the buyer to pay a certain sum and all the debts then owing by the vendor is, as to the latter, not an express showing of "what portion remains unpaid."⁴ *Quære*: Is it any showing?

But a greater difficulty arises when the obligations of a third person are named as the consideration for land sold, and are described in the deed. Bonds of a railroad company, of a city, etc., are considered somewhat as commodities, the vendor taking the chance of depreciation and loss;⁵ not so with ordinary notes. When such are fully set out, it seems natural to suppose that it was done in order to comply with the statute.⁶ But in a case where A. held the legal title, and B. the equity under his bond, and the latter sold the land to C., who holding a claim on D., caused him to give his notes direct to B., which were recited in a deed from A. to C., the court unanimously relieved C. from the lien, as to a note which but for B.'s neglect could have been enforced against D.; and, only by two voices against two, affirmed the judgment enforcing the lien for the amount of another note on which D. had with due diligence been prosecuted to insolvency.⁷

² *Ledford v. Smith*, 6 Bush, 129. The deed said that two thirds of the purchase money were paid or secured, and described the note for the last third, but contained words reserving an express lien for *all* unpaid purchase money; and was, between the original parties, held good for another third, shown to be due by parol proof,

notwithstanding the words "*expressly* stated" in the Revised Statutes.

³ Rev. Stat., Ch. 80, Sec. 26.

⁴ *Long v. Burke*, 2 Bush, 90.

⁵ *Keith v. Wolf*, 5 Bush, 646.

⁶ *Beyland v. Sewell*, 4 Bush, 637.

⁷ *Pack v. Carder*, *Ibid.* 121. Both sides seem to have considered parol testimony to show whether the par-

In the absence of the proper words in the deed, the court has established a lien on the ground that such words were omitted by mistake,⁸ or that the purchase was made fraudulently, through a person who ought to have protected the vendor's interest.⁹

The vendor's lien never gave to its holder a right of possession. Hence, while the Code of Practice confers upon a mortgagee a right to have a receiver of the rents, on a showing that the mortgaged estate might turn out insufficient,¹⁰ it grants no such remedy to the holder of a vendor's lien. It has been expressly said, in a contest between the vendor and the vendee's widow claiming quarantine and dower, that the lien in favor of the former does not extend to rents and profits.¹¹ No relief, other than a judicial sale, can be demanded.

A vendor's lien attaches to the equitable title in land which the vendor holds by bond from the owner at law, and which he sells by transfer of the bond, at least between the parties, and while the bond is not assigned for value to a third holder.¹² But wherever the contract is executory, the party seeking to enforce the lien must show himself willing and able to convey a good title,¹³ while in an executed sale the grant of a good title is presumed.

Under Section 699 of the Code of Practice a lien shall "exist" (whether reserved in words or not) on real property sold under an order of court, which the clerk of the court shall release on the margin of the record when it is discharged. This lien is "a security for the purchase money,"

ties intended to waive or to reserve a lien. But in *Carlisle v. Chambers*, 4 Bush, 268, it was held that where A. mortgages his land, the deed to be void "if certain notes made by B. and indorsed by A. are paid," the mortgage can be enforced only, if the proper steps are taken to fix A.'s responsibility as indorser or "assignor," at the case may be.

⁸ *Worley v. Tuggle*, 4 Bush, 168. See Sec. 80, n. 18.

⁹ *Phillips v. Skinner*, 6 Bush, 662.

¹⁰ C. P., 1876, Sec. 299 (old 329). Other lien holders, under Sec. 298, can have a receiver only on the grounds of threatened waste or fraud, etc.

¹¹ *Wilson v. Ewing*, 79 Ky. 549.

¹² *Barnett v. Salyers*, 11 Ky. Law Rep. 465.

¹³ *Calvin v. Duncan*, 12 Bush, 102; *Bybee v. Smith*, 11 Ky. Law Rep. 163.

and the surety on the sale bonds is subrogated to it, should he be compelled to pay them.¹⁴ The doctrine of subrogation was not formerly applied uniformly to implied liens, and the question of intention was always open ;¹⁵ but the vendor's lien as regulated by the Revised and General Statutes, and under decretal sales, by the above section of the Code, is an express lien, and stands on as high ground as a mortgage.

Ever since 1852 both liens and mortgages are, under the law then first enacted,¹⁶ generally released by a short entry upon the margin of the record book, along side of the copy of the deed which reserves the lien or creates the mortgage, the signature of the lien holder or mortgagee (or of his attorney in fact) being attested by the county clerk. These releases are often signed by an assignee of the lien or mortgage note, whose right does not appear of record ; and the title, as to the question whether the person claiming to be the owner of the note was really such at the time of the release, depends on facts wholly *in pais*. In 1876 the legislature sought to remedy the evil by providing for a short form of transferring lien or mortgage notes to be subjoined to the record of deeds and mortgages,¹⁷ but as the act is not compulsory it has done very little good. Where the lien or mortgage note is not transferred of record, and the payee named in the deed releases it (which may be brought about by a merger of the lien in the fee through a re-purchase, and his subsequent sale to a third party), the title is in favor of a purchaser in good faith without notice, cleared of the lien, though at the time of such release or merger the secured notes, or some of them, were outstanding in the hands of an assignee for value.¹⁸ Where on

¹⁴ *Burk v. Chrisman*, 8 B. M. 50. Whether a sheriff's deed, reciting the execution of a sale bond for the purchase money, thereby reserves a lien, has never been decided. But why should it not?

¹⁵ *Ormsby v. Tarascon*, 3 Litt. 414; *Henley v. Slemmons*, 4 B. M. 181.

¹⁶ Rev. Stat., Ch. 24, Sec. 13; Gen. Stat., Ch. 24, Sec. 12. The party paying a lien or mortgage is entitled to

have it released, either on the margin, or under some circumstances by deed of release, he seeing to its preparation and paying the fees. (*Macklin v. Bush*, 87 Ky. 482.)

¹⁷ B. and F. Gen. Stat., p. 887.

¹⁸ So held by the U. S. D. C. for Kentucky, in 1876, in a contest growing out of the bankrupt case *in re Morris, Southwick & Co.* An appeal to the Circuit Court was abandoned.

the face of the deed a sum is made payable to a woman, her husband at that or a subsequent time may, if there is nothing said to the contrary, release the lien as to such sum. On the other hand, where a married woman accepts a deed, the land in her hands is bound by the reserved vendor's lien.¹⁹

A lien closely akin to that of a vendor is given both by the common and statute law to secure a legacy charged on land; that is, one which the devisee of land is bound to discharge.²⁰ And though generally, in the absence of fraud, the creditors of a decedent can not pursue descended or devised land into the hands of a purchaser, who has bought from the heir or devisee before suit brought; and though general words in a will requiring all debts to be paid do not change this rule, yet where the lands, or named lands, are distinctly charged with the payment of debts, the creditors may pursue them into the hands of a purchaser, for he is by the will notified of this charge.²¹ The value of an advancement is in like manner a lien on the share of the advanced heir in the lands descended.²² And the part owners of land have similarly a lien on the share of the one among them who collects the rents and profits for whatever he wrongfully withholds.²³

Another kindred lien is that of a purchaser of land who is on any ground entitled to rescission for the money which he has paid on his purchase; and it was held in one case that he may retain possession, setting off the use against the interest, till he is repaid.²⁴ Such a lien was granted to one who had purchased under a void execution land which the debtor had "given up" to be sold.²⁵

But where the execution sale was void, because a deputy sheriff was the purchaser at a sale conducted by a brother deputy, such purchaser, though he had paid the bid, was

¹⁹ *Worthley's adm'r v. Hammon*, 18 Bush, 510.

²⁰ Gen. Stat., Ch. 50, Art. II, Sec. 2.

²¹ *Drake v. Ellman*, 80 Ky. 434.

²² *Scobee v. Bridges*, 87 Ky. Law Rep. 427.

²³ *Bridgeford v. Bowles*, 80 Ky. 529, 536.

²⁴ *Payne v. Wallace*, 6 Mon. 380.

²⁵ *Geoghegan v. Ditto*, 2 Metc. 437.

And so where the purchaser under a reversed decree of sale was not allowed to hold the land; *Miller v. Hall*, 1 Bush, 238 (see S. C., *supra*, Sec. 72).

allowed neither the lien of the execution, which was gone, nor a new equitable lien.²⁸

SEC. 93. MORTGAGES. Ever since 1820 the recording statutes have discriminated as to the time in which mortgages and that in which absolute deeds must be lodged for record;¹ and since the enactment of the Revised Statutes all "mortgages and deeds of trust" are good against creditors and purchasers without notice only from the time when they are lodged for record.² In all other respects mortgages are acknowledged, proved, lodged for record, and recorded like other deeds. The deeds of trust here named are deeds which secure a debt owing to some one else than the grantee; those named in the older acts were mainly mortgages with a power of sale conferred upon the trustee, which power was invalidated by another section of that act.³ The deeds of trust to which modern statutes mainly apply are deeds of assignment for the benefit of creditors.

We have already treated of those incidents of mortgages which they have in common with absolute deeds.⁴

Before the Code of Practice of 1851 the old doctrine of the mortgage as a conveyance which confers the legal title on the mortgagee, and leaves only an equity with the former owner, was pretty fully recognized in Kentucky;⁵ yet strict foreclosures were never in vogue: the power of the Chancellor to grant such a remedy was held in theory only.⁶

²⁸ Etlinger v. Tansy, 17 B. M. 369.

¹ The act of 1820 (M. and B. Stat., I, p. 449) allows sixty days without regard to the residence of grantors.

² Rev. Stat., Ch. 24, Sec. 11; Gen. Stat., Ch. 24, Sec. 10.

³ For construction and re-enactments, see *supra*, Sec. 63.

⁴ See *supra*, Secs. 59 and 79.

⁵ McGoodwin v. Stephenson, 11 B. M. 23, where it was held that an action on covenants of title running with the land must be bought by the unsatisfied mortgagee, not by the mortgagor. The case of Brookover

v. Hurst, 1 Metc. 665, in which the mortgagee of chattels was allowed to recover their possession, though the mortgage was fraudulent, because the granting clause is an executed contract, but the mortgagor was not allowed to redeem, because equity will not interfere *in turpi causa*, may be considered as obsolete. It is overruled by Jones v. Jenkins, 83 Ky. 391, where the whole mortgage is treated as executory, and, if fraudulent in purpose, not to be enforced.

⁶ Cauffman v. Sayers, 2 B. M. 202.

But the provision of the Code of Practice of 1851, that "foreclosure of a mortgage is forbidden,"⁷ co-operating with changes of the doctrine of mortgages in other States, seems to have exploded the old view altogether, and now the Kentucky courts go to the extreme of the new theory, by which a mortgage is at law, as well as in equity, nothing but a security for a debt. However, by another section of the Code a mortgage is ranked higher than all other liens, in this, that a mortgagee is entitled to a receiver, after default and suit brought, upon a simple showing that the estate mortgaged is likely to be insufficient for the payment of the debt.⁸

In 1877 it was said in a case in which a defendant having no color of title tried to shield himself in an ejectment by an outstanding and apparently unsatisfied mortgage:

"The old doctrine that the mortgagee is the owner of the estate has long since been exploded. . . . It would no doubt be proper to join the mortgagee as a co-plaintiff, but as he is *not entitled to the possession* . . . he can not be regarded as a necessary . . . party."⁹

In the preceding term, in a great railroad mortgage case, the rule had been laid down that the mortgagor may at will defeat an action for the recovery of the mortgaged property after forfeiture, by interposing a prayer for redemption, and asking a transfer of the action to the equity docket, where the mortgagee must be satisfied with the sale of the mortgaged land, and a receivership in the mean time.¹⁰

The "modern view" has been carried so far as to rob the mortgage of much of its value, for it no longer secures the rents and profits to the holder of the mortgage debt, unless they be expressly named. Where the lessor in a ten years' lease had mortgaged the land without reference to the lease, and then had assigned to another for value the accruing rents

⁷ Re-enacted as Sec. 404 in Code of 1854 (Sec. 375 of 1876).

⁸ Sec. 299 of new Code (Sec. 329 of 1854).

⁹ Thomas v. Harkness, 18 Bush, 28; Bartlett v. Borden, *Ibid.* 45.

¹⁰ Douglass v. Cline, 12 Bush, 608, a contest between the mortgage bondholders of a railroad and its employes over the fund in the hands of a receiver, which had accumulated pending a suit on the mortgage.

under the lease, the claims of the latter were by the Court of Appeals preferred to those of the mortgagee.¹¹ It does not appear whether the lease was recorded, or the mortgagee otherwise affected with notice of its existence. A receivership granted in the suit on the mortgage was held immaterial; coming after the assignment of the rents, it could not change the rights of the parties.

In *Douglass v. Cline*, already referred to, the trustees of two railroad mortgages had brought suit for the enforcement of their securities by judicial sale, and had obtained the appointment of a receiver under the section of the Code already quoted. The receiver operated the road, and after paying running expenses had a large surplus on hand. At the time when it was put in his control the company owed to its employees \$134,481. The court below ordered this sum to be paid to them by the receiver, and its judgment was affirmed, Judge Cofer dissenting.

Each of the railroad mortgages gave special rights to the trustee therein named; one of them empowered the trustee, after default, "to secure the profits arising from the use of the roads by taking possession and operating them himself;" the other provided "that he (the trustee) by himself or agent, or by the receiver of a court, may take possession of and operate said roads." The court held that these provisions did not contemplate the ordinary receivership given by the Code to all mortgagees, and that they had not been acted upon, and did not, therefore, increase the rights of the mortgagees or of those holding under them. The injustice and hardship in the case—managers of a railroad going on for many months, to pay interest upon its bonds, in order to keep it out of the hands of the law, and meanwhile allowing the wages of all its employees to run on unpaid—had much to do with the decision of the case; but it has for this very reason been followed by courts of other States under like circumstances.

¹¹ *Woolley v. Holt*, 688, relying (p. 792) on *Douglass v. Cline* "as conclusive of the principal point." While this is one of the last consequences of the modern doctrine, one

of the first is to treat junior mortgages as affecting the legal title, and not, as under the old rule, mere charges on an equity. (See *Stephens v. Benton*, 1 Duv. 112.)

While the mortgagee may of course stop such waste as the removal of houses from the mortgaged premises by injunction, yet he can not, if houses or trees have once been removed from the freehold, pursue the chattels into the hands of a purchaser; and one who purchases the buildings or timber from the mortgagor, for removal, is not affected with notice of the mortgage, unless such buildings be specially named therein.¹²

The tendency to turn conditional sales, or sales with a promise to re-sell, into mortgages, is as strong in Kentucky as elsewhere, and has been carried pretty far by the Supreme Court of the United States in a case coming up from Kentucky in 1852.¹³ The act of 1820, annulling powers of sale inserted in mortgages and deeds of trust,¹⁴ and the readiness with which the courts have raised a trust against bidders at judicial sales,¹⁵ go very far in protecting the indebted owner against his land being sacrificed before he can have his day in court. We have already mentioned, under the head of Executory Contracts, a case¹⁶ in which the tendency of "once a mortgage, always a mortgage," was carried to its extreme. However, where a deed is absolute on its face, parol proof as to its being intended for a mortgage is not admissible against the written contract unless there is either, an at least partial admission by the grantee, or some fraud or oppression on his part, or there was a mistake in drawing the deed.¹⁷ It was said in 1847 as to absolute deeds or like transfers of title bonds: "The same rules are applicable in both cases to show that the instrument, though absolute on its face, was only intended to have the effect of a mortgage. In each case an admission by the creditor that the object contemplated was not an absolute translation of the title, but a creation of a security, would avoid the rigid rules of evidence . . . and permit the introduction of oral testimony to evince the nature and extent of the creditor's lien."¹⁸

¹² Harris v. Bannon, MS. O., S. T. 1880.

¹³ Russell v. Southard, 12 How. 139.

¹⁴ See *supra*, Sec. 63.

¹⁵ See *supra*, Sec. 72, and Sec. 83, *sub fine*.

¹⁶ See *supra*, Sec. 80, n. 6. (Honore v. Hutchins.)

¹⁷ Thomas v. McCormack, 9 Dana, 102.

¹⁸ Vanmeter v. McFaddin, 8 B. M. 435, 439.

A mortgage for future advances was first passed upon in Kentucky, as far as known, April 5, 1890. The well-known doctrine was recognized. No subsequent encumbrance for value came into conflict with the mortgage, but only an assignment for the benefit of creditors and the homestead right, and it was enforced against both. On its face the mortgage was given to secure a note for \$5,000. The payee held this note as collateral for a smaller sum of advances which he made from time to time, in part after the maturity of the principal note. Its connection with the advances was shown by parol, but of this the grantors could not complain, as this proof diminished the lien; nor was the wife's objection allowed, that the effect of the deed was different from that which was read and explained to her for the purpose of her acknowledgment.¹⁹

The equitable mortgage by deposit of title papers is unknown to the law of Kentucky, being incompatible with its recording laws. Even where a title bond was pledged to indemnify a surety, but was not indorsed or assigned in writing, it was held that such an act gave no lien on or equity in the land named in the bond.²⁰

SEC. 94. THE MECHANIC'S LIEN. The mechanic's lien laws in force before 1858 were local to the cities and counties therein named. A general lien law was passed in that year, which is substantially re-enacted in Chapter 71 of the General Statutes. A separate law for Louisville and Jefferson County, passed in 1869 (soon afterward repealed and then re-enacted), is in force in that city and county,¹ but it does not cover the whole ground of such a statute, and must be read in conjunction with the general law.²

The title of the chapter and its leading clause secures a lien to "mechanics, laborers, and material men." But the architect who is employed to devise the plan and to superintend the progress of the work does not fall within either of these

¹⁹ Louisville Banking Co. v. Duile, 11 Ky. Law Rep.

²⁰ Porter v. Howard, 1 A. K. Mar. 358. Neither can a mortgage which is once annulled by payment of the debt be revived so as to become a

lien, by redelivering the deed as a pledge for a new loan. (Thompson's adm'r v. George, 86 Ky. 311.)

¹ Lou. City Code, p. 453, 17.

² So held in Nunes v. Willis, 12 Bush, 363.

three classes, and, like the master of a ship under the maritime law, has no lien.³

The lien is given by the first section for work or material bestowed in erecting, altering, or repairing any house, building, or structure, or fixture or machinery therein, also for excavations or any other "improvement of real estate," and attaches to the improvement itself, and to the interest of the owner in the land. Whether the word "structure" will take in a whole railroad is left undecided; but, at any rate, a mechanic can not enforce a lien under this law against a single bridge, trestle, or culvert, as public policy forbids the breaking up of a railroad.⁴

The next section gives, where the "owner" (that is, he who employs the mechanic) holds by executory contract, and for any cause the land reverts, a lien against the third party "to the extent only that the actual value of the property may be enhanced by the improvements." The third section transfers this lien to the compensation which the "owner" may, after eviction by better title, have as an occupying claimant. The fourth section allows the lien holder to remove improvements from leased premises (if it can be done without material injury to previous improvements) when the lease is forfeited or surrendered before the expiration of the term, and the landlord is unwilling to pay for them. The fifth section, as far as it provides for subrogating those who furnish work or material to the contractor to his lien, with all prerequisites and conflicting rights, will be treated elsewhere. In its last clause it denies a lien if "security shall have been taken for the labor performed or materials furnished."

Section six requires the lien to be "dissolved," unless a sworn statement of the lien, giving the true amount due, with all credits and set-offs, and an identifying description of the property bound for it, is filed with the county clerk within sixty days after the claimant "ceases to labor or furnish materials;" and section eight "dissolves" it unless suit is brought within six months after filing the statement, with a saving of

³ Foushee v. Grigsby, *Ibid.* 75.

⁴ Graham v. Mt. Sterling Coalroad Co., 14 Bush, 425.

the further six months after the qualification of a personal representative, should the claimant die within the six months given to him. Sections 7, 9, 10, 11, 12, 13, and 15 regulate the proceedings in equitable suits for the enforcement of mechanic's liens. Section 14 directs:

"The liens . . . shall not be . . . valid against a *bona fide* purchaser for a valuable consideration without notice, actual or constructive; but if such purchaser receives notice . . . before the payment of the whole of the purchase money, the lien shall operate on the purchase money remaining unpaid. The pendency of a suit to enforce the lien, or the filing of the . . . statement in the clerk's office, . . . as required by Section 6, . . . shall be deemed constructive notice."

A mortgagee is a purchaser within the meaning of this section; and that the building is unfinished and the work going on upon it, is not notice of the debt owing to the mechanics, or of the lien, and this clause is in force in Louisville and Jefferson County.⁵

After a creditor has obtained a lien upon land by execution, attachment, or *lis pendens*, a builder or material man having notice thereof (*quære*, must it be actual notice?) can not obtain a superior lien by doing work or furnishing material toward improving the land.⁶ The land of a married woman can be subjected to the mechanic's lien, in the mode and under the circumstances in and under which a *feme covert* can charge her estate.⁷ But the mechanic's lien is superior to the dower

⁵ Wellisch v. Nunes, and Foushee v. Grigsby, *ubi supra*, and Gere v. Cushing, 5 Bush, 804.

⁶ Jones v. Jeffress, 11 Bush, 686. A hard case: for the holder of the legal title, who had sold by parol only, and could not have been compelled to convey, and to whom no part of the price had been paid, furnished the material. Of course, where a mortgage is recorded, as in Foushee v. Grigsby & Robinson (n. 3), mechanics and material men are warned, that whatever they do or furnish

thereafter will be postponed. How they will stand as against an older *unrecorded* lien has not been decided.

⁷ Robertson v. Riggs & Smith, 84 Ky. 251. But where a married woman gives her note in writing for building or repairing a "necessary" dwelling house, fences, out-houses, etc. (see *supra*, Sec. 87), she is the employer, and the mechanic's lien can be enforced against her in the ordinary way. (Marsh v. Alford, 5 Bush, 892.)

of the owner's widow, to this extent at least, that she can have dower only to the value of the lot before the unpaid improvements.⁸

Where the builder or material man accepts a note or obligation which does not mature within the time in which the lien must be put in suit, he thereby waives the rights given by the statute.⁹

A note signed by the owner or employer alone is not such a "security" as under Section 6 will destroy the lien; nor is the lien lost by a transfer of the note, or by its return from the discounting bank to its payee, the material man or mechanic.¹⁰

The act for Louisville and Jefferson County is more favorable to the mechanic or material men than the general law.

The first section gives a *joint* lien, a phrase taken from the act of 1858, but dropped in the General Statutes, though they are generally construed as if this word was retained. The lien is "superior to all others on such . . . structure, and the fixtures and machinery so constructed, when the structure is wholly new, and upon any machinery or fixtures, . . . additions . . . to a previous building which (can be) severed without . . . material injury thereto," and "superior to all . . . encumbrances upon the interest of the employer in the lot . . . built upon, and any previous structure," etc. There is no lien for a demand under \$10. We have seen above that subsequent mortgagees without notice of the liens have been preferred. But as to the improvements put up by the mechanic, his claim is superior to the vendor's lien on the unimproved lot.¹¹

⁸ *Lowe v. Nazareth L. and B. Institution*, 1 B. M. 257. It is not clear whether the widow was not by the mechanic's lien deprived of her dower altogether, though, if she was, it could hardly be good law.

⁹ *Hardin v. Marble*, 18 Bush, 58. The time within which suit is to be brought is not an ordinary limitation running from the accrual of the action. And if one note is, and another is not due, within the time, a suit brought upon the former does not

raise a lien in favor of the latter. (*Pryor v. White*, 16 B. M. 605, 608.)

¹⁰ *Graham v. Holt*, 4 B. M. 61; *La-viollette v. Redding*, *Ibid.* 81; *Finch v. Same*, *Ibid.* 87.

¹¹ *Louisville Building Associat'n v. Korb*, 79 Ky. 190. In this case a vendor's lien, mechanic's lien, and subsequent mortgage taken without notice came into the conflict; the estimated proceeds of the improvement were given to the mortgagee to the loss of the mechanic, not of the vendor.

The second section allows a suit to be brought within twelve months without the previous deposit of a statement in the county clerk's office; the only effect of such deposit is that of a constructive notice.

The third section gives sub-contractors and laborers, and those furnishing material to the contractor, a mode by notice to have themselves subrogated, and under the fourth section the owner may pay them and claim credit in his account with the contractor. The fifth section authorizes a sub-contractor (including a material man) to notify the owner that he will thereafter, for all work or material, look to him and to the lien for his work or material, stating "the contract price or probable value thereof," and unless by the next day the owner warns him not to do so, the former will acquire a lien for whatever he furnishes thereafter, to be credited on the demand of the principal contractor.

Section 6 directs that where the employer "could not bind the land for a sufficient estate to satisfy the liens, the court may provide for the sale or removal of the house, etc., when it is wholly a new structure, or of the fixtures, . . . additions, . . . so far as the same can be removed without material injury to the former structure not owned by the employer, or to rent the same for the benefits of the claimants"—the election, if renting will satisfy the liens in a reasonable time, being given to the owner of the land.

Section 7 gives the court power to have property of an infant *cestui que trust*, or of a married woman in separate estate, upon which work or material has been put at the instance of the guardian, trustee, or husband, rented out, or upon proper petition of the guardian, the trustee, or the married woman (or answer in the mechanic's lien suit asking for such a course), to have it sold, then to pay the liens and to reinvest the remaining proceeds. It is doubtful whether under this section a sale could be ordered, unless the allegations and other steps were made to conform to the provisions of the Code referred to above in Section 76.

Under Section 8, where the employer is a lessee for years, or tenant of less than a fee, the court may either sell his inter-

est, or sell and remove the house. Section 9 provides for apportioning the lien of material men among several parcels on which their material has been used. Section 9 treats of the service of notices. The last or tenth section repeals the general law of 1858 only as far as it conflicts with the act, and thus lets in the saying of that law in favor of purchasers without notice. An amendment of April 1, 1882, extends the benefit of the act of 1869 to "painting, papering, frescoing, and other ornaments," to which it must, however, have applied before.¹²

The following is the substance of an act of March 20, 1876, repealed in 1880 as far as it applies to other establishments than railroads, when stripped of its verbiage, of the repealed portions and of the clauses regulating the remedy:

"When the property or effects of any railroad company shall come into the hands of any commissioner, receiver of a court, trustee or assignee for the benefit of creditors, the employes of such company (and the persons who shall have supplied materials or supplies for the carrying on of such business) shall have a lien on such property or effects as may have been embarked in said business, including the interest of said company in the real estate used in carrying on such business. The lien shall be superior to any mortgage or encumbrance *heretofore* or hereafter created: *provided*, no president, chief officer, director, or stockholder shall be deemed an employe within the meaning of this act. When the 'trustee' continues the business he shall, at the end of each month, distribute the money in his hands (after paying debts to the United States and to the State), deducting twenty per cent for contingent expenses, among the lien holders under this act." The lien shall attach upon any suspension of the business. Suit to enforce the lien must be brought within sixty days. The lien is also given for injuries to property caused by the carelessness of a railroad company or its employes.¹³

SEC. 95. LIENS BY PROCESS OF LAW. An execution or attachment becomes a lien from the time that it is put into the hands of the sheriff or other executive officer of the county in

¹² Lou. City Code, p. 459.

¹³ B. and F. Gen. Stat., p. 877.

which the land lies. (See Sections 71 and 73.) A judgment for the payment of money, without an execution issued thereon, raises no lien. But the beginning of an action in which the creditor *rightfully* asks that certain lands, described in his petition, may be subjected to the payment of his demand, creates a lien on such lands for the satisfaction of the debt. The action is commenced "by filing a petition in the clerk's office, and causing a summons to be issued or a warning order to be made."¹ Hence he who examines the title to lands offered for sale must look for "pending suits" as well as for executions and attachments.

A creditor having obtained a judgment for money (or a bond having the effect of a judgment), and a return of "no property" on a *feri facias*, may in his petition in equity for the enforcement of the judgment describe the property which he wishes to subject, and thus without taking out an attachment (under Section 441 of the Code of Practice) obtain a lien thereon, which will prevail against a subsequent attachment.² But neither the common law nor any statute³ authorizes a creditor to file a petition in equity against his debtor, and a fraudulent grantee from the latter to set up therein an adjudged demand, and to ask for the sale or subjection of the thing fraudulently granted,⁴ or of land fraudulently bought with the debtor's means in the name of another; but he may, upon affidavit and bond, have his attachment and may levy it upon the thing fraudulently conveyed or bought⁵ as on the property of the debtor.

The true reason why a creditor can not, before judgment

¹ C. P., Sec. 39. This applies to a demand set up by way of cross-petition. (Hart v. Haydon, 79 Ky. 346.)

² Parsons v. Meyberg, 1 Duv. 206. The opinion is very short, and does not show that the appellee had a judgment and return of *nulla bona*, but the record shows it.

³ Such a statute was passed in 1838, became needless by the Codes of 1851 and 1854, but was treated as being in force till repealed by the Code of 1876.

⁴ Napper v. Yager, 79 Ky. 241, in accord with the decisions before 1838, and with several preceding MS. Opinions. (Brewer v. Hill, 1877.) Approved in Martz v. Pfeifer, 80 Ky. 600, and followed in a number of cases in 10 and 11 Ky. L. R. As to suits against absent defendants, see Sec. 418 of C. P., and *supra*, Sec. 69.

⁵ Kyle v. O'Neil, 10 Ky. Law Rep. 709.

and execution, assail a conveyance by the debtor, is well put in a case arising under the homestead law: "A fraudulent conveyance does not enlarge the rights of the creditors, but leaves them . . . as if no conveyance had been made;"⁶ and this is the reason given by Chancellor Kent. In fact the fraudulent grantee has done the creditor no harm until the latter runs upon his adverse claim, when the sheriff comes to levy the execution; and, on principle, there can be no action until the plaintiff has suffered harm. The Kentucky courts have, however, placed their doctrine on much weaker ground, namely, on the incompetency of a court of equity to try the action at law for the debt. Hence, where a suit to set aside a conveyance was brought before judgment on the debt, but the defendants answered on the question of fraud only, and the case was "tried out," ending in a judgment subjecting the property conveyed to the plaintiff's demand, the Court of Appeals was unwilling to disturb the judgment.⁷

Hence, also, the old decisions will be followed, in which an equitable demand for money (f. i. upon the rescission of a sale for fraud) was favored as against a demand at law, so that a bill to set aside a fraudulent conveyance, before judgment, was sustained as to the former, but not as to the latter.⁸

Where encumbered lands have been formally sold under execution, any creditor of the owner can, by suit in equity, obtain a lien for his demand, subject to the old encumbrance, and to a lien for the bid at the nominal sale, with ten per centum interest on the latter.⁹

An action brought to settle a decedent's estate, or to subject descended or devised lands to a decedent's debts,¹⁰ creates a lien:

⁶ Kuevan v. Speckert, 11 Bush, 1, 4.

⁷ Barton v. Barton, 80 Ky. 212.

⁸ Halbert v. Grant, 4 Mon. 580 (1827), following Stern v. Sedden, 4 Bibb, 178, where the point passed *sub silentio*. A lien gained by any creditor's suit, in which property fraudulently granted away is sought to be subjected, does, of course, not overreach an execution already lev-

ied on the same property, but the sale under the latter reaches back to the time when it was put in the officer's hands.

⁹ Under G. St., Ch. 88, Art. XIV. See *supra*, Sec. 71.

¹⁰ C. P., Secs. 428, 429; G. St., Ch. 44, Art I, Sec. 10. See Treadway v. Turner, 11 Ky. L. R. 949.

in the former case for the benefit of all his creditors, in the latter case, in the first instance for the plaintiff's benefit, but with leave to the other creditors to share in the benefit of the action before and perhaps also after judgment.¹¹

An action to turn an attempted preference into a general assignment is notice to all the world; and so of any other action in which a pre-existing, unrecorded or latent encumbrance, lien or equity is set up.¹²

When a decree of dismissal has been rendered in a suit to enforce an unrecorded lien, or in one which seeks to raise a judicial lien, is the suit still "pending" between the dismissal and an appeal? The question has not been directly decided; but the English rule, which is in the affirmative, has been approved *arguendo*.¹³

The benefit of a pending suit may be lost by neglect. Where a suit had been brought on an unrecorded mechanic's lien in 1852, and was ready for trial in April, 1853, but no steps were taken till 1857, when a mortgage given in 1856 on the same property was put in suit: the mortgagees, having no actual notice of the lien, were held not to be affected by the lien of *lis pendens*.¹⁴ A latent lien, it was said, should not be continued beyond a period necessary for its enforcement.

A statute, applying also to money demands, gives to an at-

¹¹ G. S., Ch. 44, Art. II.

¹² *Owings v. Myers*, 3 Bibb, 278 (suit on a title bond), is very weak; but a *lis pendens* is treated as constructive notice as of course in a number of cases in which a *pendente lite* purchaser was held to stand in the shoes of his grantor.

¹³ *Clarkson v. Morgan's devisees*, 6 B. M. 441; *Watson v. Wilson*, 2 Dana, 406.

¹⁴ *Ehrman v. Kendrick*, 1 Met. 146, following *Watson v. Wilson*, just quoted, where a delay of two years after death of a defendant and before steps to revive was held fatal; and where the English rule is approved, that the suit is pending between the dismissal

of the bill and an appeal, and is applied to the ordinary interval between abatement by death and revivor. Also *Clarkson v. Morgan's dev's*, just quoted. (The point ruled in the latter, that a bill *in personam* brought in a county not of the *situs*, to compel a conveyance, does not raise the notice of a *lis pendens*, could hardly arise now. See, however, *McQuerry v. Gilliland* in note to Sec. 78.) It was said in *Gossom v. Donaldson*, 18 B. M. 230, 237, that, to work as a *lis pendens*, a suit need not be pursued with even ordinary diligence; it loses its force only "by unusual and unreasonable negligence."

torney at law, employed by the plaintiff or defendant, a lien on any property, personal or real, that may be "recovered."¹⁵ This word, in case of the defendant's attorney, must mean as much as "saved." A method is given by which the attorney can place his lien claim on record; yet it seems that for a reasonably short time he would be protected without it, his connection with the case being sufficient notice to the world of his services and claim to a fee, as was held in the case of a money demand.¹⁶ In the only reported case referring to land, a lawyer employed to prevent the confirmation of a judicial sale (it does not appear whether he succeeded) was held to have no lien on the rents accruing on the land, pending the dispute, as nothing was "recovered" by him.¹⁷

SEC. 96. SUB-PURCHASERS. Where the owner of a tract which is subject to a mortgage or to a vendor's lien sells a part and retains the rest, his own part must, of course, be taken first, to the relief of what he has sold. But where he has sold different parts to several purchasers at successive times there is room for two contrary rules: while in New York the burden will fall on each later purchaser, to the ease of those preceding him, the Kentucky rule subjects the several parcels *pro rata* to the burden of the common encumbrance.¹ While at first the parcels were valued as of the dates at which they were acquired from the common owner, the court in the next case approves the decree of the Chancellor, who, "having ascertained the value of each parcel of the land, distributed the common burthen *pro rata*," thus taking for a basis the value at the time of preparing the decree of sale.² In a somewhat later case³ the matter is more fully considered; and

¹⁵ G. St., Ch. 5, Art. 1, Sec. 15. This almost nullifies the champerty law as far as it forbids the employment of an attorney for a share of the thing to be recovered.

¹⁶ Stephens v. Farrar, 4 Bush, 13.

¹⁷ Wilson v. House, 10 Bush, 406. A short and unsatisfactory opinion.

¹ Morrison v. Beckwith, 4 Mon. 76, quoting Stevens v. Cooper, 2 J. C. R.

430, following Hughes v. Graves, 1 Litt. 19, a case arising out of a mortgage of slaves which were sold at different times.

² Chrisman v. Burke, 3 B. M. 50.

³ Dickey v. Thompson, 8 B. M. 812. It is here said that nothing in the case of Winfrey v. Williams, 5 B. M. 428, is at variance with this doctrine, but the sentence on p. 430, l. 25, "but

though the doctrine of equality among those purchasing at different times is adhered to, it is much weakened by an intimation that a different result might follow if the second vendee had actual notice, not merely notice through the record, both of the mortgage and of the sale of the first parcel, or if there was any combination or bad faith. The recorded deed of the first parcel is, as is here truly said, constructive notice only to those who thereafter come to buy it or to levy on it for their demands; but in the examination of the title it can hardly fail to meet the eye of the second purchaser or of his attorney, and thus there will generally be actual notice to the later purchasers. In the case then before the court two of the "parcels" were slaves included along with certain lots in the mortgage, and slaves were not bought upon a search of the records.

Upon the authority of Chancellor Kent in *Cheesebrough v. Millard*, J. C. R. 415, and approving the rule followed in the last preceding case, the value of each parcel at the time of the decree of sale⁴ is to govern in apportioning the burden. The New York cases of *Clowes v. Dickenson*, 5 J. C. R. 242, and *Gill v. Lyons*, 1 J. C. R. 447, are distinguished as "cases of judgment liens and sales under execution," and it is said that they are clearly distinguishable from the case in hand. "And if they are not, they are in conflict with the principles settled by this court." Upon a rehearing C. J. Marshall admits that the decision is not in harmony with the later New York cases, but that the court is bound by its own three precedents, and the question should no longer be considered an open one. But two questions are hardly decided: first, if it be an attachment or creditor's suit instead of a mortgage, will the burden be apportioned? second, if the later sub-purchasers know of the mortgage and of the previous purchases (as they generally will), must not the New York rule be applied?

At any rate, where part of the tract which is subject to a

were equitably bound to exhaust the residue before resorting to the slaves purchased by Sutherland," is clearly at variance with it, and simply over-

ruled.

⁴ "At the time of foreclosure" is the language used in *Exchange Bank v. Stone*, 80 Ky. 113, 120.

common lien is sold for value, and the residue is conveyed to an assignee for the benefit of creditors, or "assigned" by operation of law, this residue must be first subjected to the lien, to the relief of the part actually sold.⁵

SEC. 97. RIGHTS OF WAY. We have treated of streets and highways in chapters on Constitutional and Political Law. "Passways" are regulated by an article of the General Statutes which follows upon the article treating of "Roads," and borrows from it much of its machinery, by which one who needs a passway over another's land may obtain a condemnation in the County Court, and have his passway upon payment of the price named by a jury.¹ The applicant must need the passway to "attend courts, elections, a meeting-house, a mill, a warehouse, ferry, to pass from one tract of his land to another, or railroad most convenient to his residence." It must not exceed twenty feet in width, and not pass through a town lot, orchard, burying ground, building, or yard. The constitutionality of a law which upon previous compensation takes private property for private uses, though on the statute book for a long time, has never been tested. Aside of the statute there is, however, a passway by necessity, growing out of the sale of the part of a tract shut off by the residue.² The grant of a passway (if more than a license for five years) must, unlike the dedication of a highway, be in writing. There is also a passway by prescription, which will not be gained if the owner of the soil himself uses and frequently changes a way without consulting his neighbor, who claims the easement,³ thus indicating that its use by the neighbor is permissive.⁴

The method by which railroad companies can obtain their rights of way is now regulated by a general law of April 1, 1882,⁵ which repeals all other rules of proceeding found in the

⁵ Com. v. Simms, 3 Met. 391, relying on Winfrey v. Williams, *supra*.

¹ G. St., Ch. 94, Art. II.

² Hall v. McLeod, 2 Met. 98; Thomas v. Bertram, 4 Bush. 317.

³ Hall v. McLeod, *supra*.

⁴ *Ibid.* and Bowman v. Wickliffe,

15 B. M. 84, 99. The time of limitation now in vogue to bar actions for land (that is, fifteen years) is also sufficient to prescribe for a right of way or other easement.

⁵ B. and F. G. St., p. 281 (inserted as Ch. 18 a).

several railroad charters granted before that day.⁶ The act provides that the jury shall find separately the value of the land actually taken, and the damage which the railroad, when prudently managed, will inflict on the adjoining lands of the owner, and from this damage they may deduct such benefits as the railroad will confer on those lands. Under a general authority to condemn lands the railroad company can not condemn a highway or a turnpike.⁷

The condemnation of lands for turnpikes is regulated by a chapter of the General Statutes.⁸ A company incorporated for the purpose of "making a turnpike, gravel, graded, or plank road" may, by condemnation, obtain land not only for its way, but also not exceeding ten acres of land for erecting a toll-house for the use of a gate-keeper and his family, and may have the "land or material" condemned when it can not be obtained by private agreement. Where land is thus condemned the company gains only an easement, either of way or of quarrying. The fee still remains with the previous owner, and he may remove his houses from it.⁹ A section of the law (22) forbids the condemning of a quarry within two hundred yards of any dwelling house, or so near to a garden, orchard, or spring as to impair its value. A shanty put up on purpose to keep off a quarry, though some one be induced to stay in it, is not sufficient to effect the purpose, as "good faith" is required by the law here as in all other cases, while if a building be put up in good faith to live in its humbleness or fragility could not be considered.¹⁰

Under Section 13: "No lateral road shall be opened to and from the same places now (or hereafter) connected by any turnpike, etc., so as to run within one mile (thereof); and any such lateral road now in use, or etc., shall by order of the

⁶ *Chattaroi Railway Co. v. Kinner*, 81 Ky., 221. For invalidity of clause allowing railroad company to take possession on giving appeal bond and without payment, see *supra*, Sec. 15, n. 15.

⁷ *Kenton County v. Bank Lick T. P. Co.*, 10 Bush, 529, 535, incidentally

following case in 4 Cushing, 63.

⁸ Ch. 110, "Turnpikes, Gravel, and Plank Roads;" Ch. 103 of the Rev. St.

⁹ *Morris v. Schollsville T. P. R.*, 6 Bush, 671.

¹⁰ *Morris v. Schallsville Branch*, 4 Bush, 448.

County Court be . . . closed" (except as to a distance of one mile from a town or city). The word lateral is meant for parallel, or nearly so. Under this law the Court of Appeals was, at the Winter Term of 1857, called upon to order the shutting up of a State road which had been established in 1817, and ran through a thickly settled neighborhood, along-side of a post-office, school-houses, etc., for the benefit of a recently established turnpike, and while admitting the oppressiveness of the law, enforced it, as it could not see its way to declaring it unconstitutional.¹¹ But where a turnpike which had been proposed to run from one town to a neighboring town was actually built so as to run three miles aside of it, an order shutting up the old road which ran near to and parallel with the turnpike for part of the way, was reversed, as the roads were not between the same termini.¹²

Little else of the law pertaining to rights of way is peculiar to Kentucky.

SEC. 98. OTHER EASEMENTS.

I. *Light and Air*. Though the contrary view had been intimated in 1844,¹ the Court of Appeals, speaking through Judge Cofer, C. J. Lindsay dissenting, in 1878, solemnly declared that the doctrine of ancient light, as prevailing in England and in a few American States, is not law in Kentucky; that is, a man does not gain the right to light and air (nor the kindred right to have no rain-water thrown on his land from an adjoining building) simply because his neighbor had for twenty (now fifteen) years allowed his adjoining lot to remain vacant.²

¹¹ Campbell T. P. Co. v. Dye, 18 B. M. 761, 767, relying on a MS. Op. of S. T., 1854. The closing of city streets when injurious to a neighboring lot owner has been thought unconstitutional. See Sec. 15, n. 3.

¹² Shuck v. Lebanon Turnpike Co., 9 Bush, 168.

¹ Manier v. Myers, 4 B. M. 514. The allusion to light and air is wholly incidental. But the English doctrine

of "presuming" a grant of an easement from twenty years of enjoyment is referred to, quoting for it *Millers v. Burgen*, 1 Dana, 859.

² Ray v. Sweeney, 14 Bush, 1. It is said that perhaps in some cases a right to the light and air coming over the adjoining lot might arise, where A. being the owner of both lots, sold to B. that which needs the light and air, while retaining the other. An

Where a house owner bought from his neighbor (who was anxious to sell) at cost price a lot fronting ten feet, for the avowed purpose of having a strip of land which should not be built upon next to his side door and side windows, which might give him light and air, he was allowed to put up screens to exclude the view of his neighbor from whom he had bought, but with some doubt and reluctance the court enjoined him from putting buildings on the strip of land which he had bought for his own, not for the vendor's benefit, on the ground that probably the latter would not have sold the ground but for the buyer's avowal that he would not build upon it.³

II. *Flow of Water.* But little water-power is used in Kentucky, and the cases arising as to flow of water are, when compared with those in the New England States, few and unimportant.

One who enjoys the light and air of a neighbor's lot does not trespass on it in any way, and can not by unrestrained, continued wrong gain a right; it is otherwise where one throws water back on his neighbor's land or mill wheel, or diverts it. If his action is tortious, the failure for fifteen years to sue him may give him a prescriptive right to continue as he has done. Hence, to the use or diversion of water prescription may be as applicable as to passways.

A suit for damages, by the upper against the lower of two mill owners on the same creek, came twice before the Court of Appeals. On the first appeal Chief Justice Marshall asserted the doctrine of a prescription not growing out of a continued tort. He says: "The enjoyment of the free flow from the upper mill did not constitute such an invasion of the possession of the lower mill as would authorize an action, and there is no room for applying the Statute of Limitations. . . . But the statutes, instead of being the basis of these presumptions, are . . . founded on them." He deduces the doctrine that where the free flow of water to or from a mill has been enjoyed for twenty (now fifteen) years, it may not be ob-

opinion of Lord Cockburn is quoted, in which the doctrine of presuming grants is denounced as a bold usurpa-

tion on the part of the judges who invented it.

³ *Athey v. McHenry*, 6 B. M. 50.

structed by one who before the end of that time could have done so in the exercise of a legal right. On the second appeal the doctrine was rendered practically worthless by an opinion which denied that either a greater height of dam than there had been for twenty years or greater resulting floodings were conclusive as showing an infringement of the prescriptive right.⁴

In the *consumption* of water by the upper owner there is this distinction, that while he may take all that he reasonably needs for domestic and farm use, that for extraordinary needs, such as a mill or railroad station, he must take only so much as will leave a sufficient supply to the lower owner,⁵ especially where the latter has established a grist mill under the statute and orders of the County Court.⁶ But though the owner of the soil may use for himself the water flowing in hidden veins under it, and thus deprive his neighbor of the accustomed feeders to his spring or well, he has no right to pollute it by allowing oil or other noxious substances to penetrate the soil into those veins, not even in the ordinary course of business, and without intent or even neglect.⁷ The grant of a water privilege, as of any other easement, must be in writing, or will only confer an estate at will.⁸

III. *Lateral Support*. Two reported cases bearing on this and kindred subjects are found in the Kentucky Reports.⁹ The first presented a rather novel question: Is a fence such an additional weight put upon the land as will deprive the owner of the ordinary right to have for his land the lateral support from the neighboring soil. The court answered the

⁴ *Manier v. Myers*, 4 B. M. 518; *Same v. Same*, 6 B. M. 136; *Hahn v. Thornberry*, 7 Bush, 404 (on throwing back surface water), and *Tye v. Catching*, 78 Ky. 463 (on use of water-power), present no special features of Kentucky law.

⁵ *Redman v. Foreman*, 83 Ky. 215; *Anderson v. Cinc'ti Southern R. R.*, 86 Ky. 44.

⁶ Gen. Stat., Ch. 77, Sec. 1, taken through R. S. from act of 1797; B. and

M. Stat., II, 1212; Litt. Laws Ky. I, 606, and regulating *ad quod damnum* proceedings in behalf of grist mill.

⁷ *Kinnaird v. Standard Oil Co.*, 11 Ky. Law Rep. 692, contrary to three late decisions in other States.

⁸ *Durrett v. Simpson*, 8 Mon. 517, 522.

⁹ *Aside of Shreve v. Stokes*, 8 B. M. 453, where plaintiff recovered for the negligent manner of digging away the earth next to his house.

question in the negative, mainly on the quaint ground that the law favors and will not discourage the inclosure of land.¹⁰ In the other case the owner of two houses had sold them to different purchasers, by such lines that the roof of one man's house rested on a wall standing entirely on the other purchaser's lot. The latter was held to have bought *cum onere*, and was enjoined from removing his wall.¹¹ In the former case an injunction was also deemed the proper remedy.

IV. *Abandonment of Easements.* The abandonment of an easement which has been acquired by actual purchase, or by condemnation and payment, will not be readily implied from non-user. Where a city had land condemned for a canal basin, and had paid for it, but for want of funds failed for twelve years to dig a canal, and without giving up the project, used the land meanwhile for other purposes, the owners of the fee were not allowed to recover the possession.¹²

NOTE—The chapter on Charities and Churches, which will be found in the Third Book, dealing, as it does, mainly with trusts upon land, ought to have been inserted here, but was delayed in its preparation.

¹⁰ *Oneil v. Hoskins*, 8 Bush, 652.

¹¹ *Henry v. Korb*, 80 Ky. 891.

¹² *Curran v. City of Louisville*, 88 Ky. 628.

CHAPTER XV:

LIMITATION OF ACTIONS FOR LAND.

- SEC. 99. Length of the Bar.
 - SEC. 100. Saving Disabilities.
 - SEC. 101. The Thirty Years' Bar.
 - SEC. 102. Adverse Possession.
 - SEC. 103. Extent of Possession.
 - SEC. 104. The Seven Years' Law.
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SECTION 99. LENGTH OF THE BAR. The Revised Statutes of 1852 made the limitations contained therein only applicable to causes of action which should arise thereafter, but after some abortive efforts the act of May 31, 1865, going into effect in one year thereafter, was passed,¹ which extended the limitations of 1852 to causes of action then existing. Under the former law the limitation of "a right of entry," that is, for bringing an action of ejectment, had been twenty years.² The new limitation, transferred word by word from the Revised to the General Statutes, reads thus: "An action for the recovery of real property can only be brought within fifteen years after the right to institute it has first accrued to the plaintiff, or to the person through whom he claims."

This applies to equitable actions, where the bar of the statute takes the place of the old defense of staleness, and to suits for dower, or for establishing an easement.³ And as dower must be first allotted before possession can be demanded, the widow

¹ Myers' Suppl., 295, sustained in *Lockhart v. Yeisn*, 2 Bush, 231.

² And for a writ of right on the possession of the ancestor, fifty years, on his own possession, thirty years; but that remedy could not be used to recover land under old theretofore unused patents, as the demandant

had to prove on the grand *mise* the previous "taking of esplees."

³ *Ray v. Sweeney*, 14 Bush, 1; because General Statutes, Ch. 21 (Construction of Statutes), Sec. 18, says that "real estate" shall include lands, tenements, and hereditaments, and all rights other than a chattel interest.

may bring her suit against the heir or other owner of the fee, though the land of which she is dowable be not occupied, and the fifteen years, even as to a vacant lot, run from the death of the husband.⁴

An action to redeem a mortgage is an action for land, and is barred by another section of the law in fifteen years after possession is taken by the mortgagee and held adversely by or under him ; but a suit to enforce the mortgage by sale is only a mode of suing for the debt ; and when that is gone by lapse of time, for instance, when the debt is in the form of an account or bill of exchange, and therefore barred in five years, the mortgage is also gone.⁵ And thus the street contractor's lien on the lots of abutters, or the lien of a city or county tax, is gone in five years, being only an incident to the " liability arising from statute."⁶ A vendor's lien, unaccompanied by note or covenant, is nevertheless, by the acceptance of the deed, a liability arising by written contract, and as such good for fifteen years from the maturity of each installment as to it.⁷ Where a mortgage or lien is kept alive as against the mortgagor or vendee by partial payments, it can, nevertheless, not be enforced against a purchaser without notice, when the notes named in the recorded instruments have been overdue for fifteen years.⁸

The title to land may, in cases of " fraud or mistake," be changed by the lapse of five or ten years. A fraudulent grant made by a debtor may be set aside by creditors and purchasers ; a voluntary deed is deemed void as to antecedent creditors. The limitation in suits to be relieved against fraud or mistake being five years from its discovery, but not more in all than ten years from the making of the contract or the perpetration of the fraud, under Article III, Sections 2 and 6, of the Limitation Law, it has been held, that after a lapse of

⁴ Anderson v. Steritt, 79 Ky. 499.

⁵ Prewitt v. Wortham, 79 Ky. 287.

See also Yates v. Weeden, 6 Bush,

439; Vandiver v. Hodge, 4 Bush, 539.

See *contra*, Ch. 71, Art. IV, Sec. 16.

⁶ McCracken County v. Mercantile

Trust Co., 84 Ky. 344. It is undisputed law and usage.

⁷ Elliott v. Saufley, 10 Ky. L. R. 908.

⁸ Tate v. Hawkins, 81 Ky. 577.

ten years a creditor can not impeach a fraudulent or voluntary conveyance; though there is no adverse possession (the fraudulent grant being made to the debtor's wife and children), and though the creditor does not succeed in obtaining his judgment before the ten years have expired, and is not therefore in a position to have his creditor's bill to set aside fraudulent conveyances; neither can he levy upon the land, under his execution, after the lapse of ten years from the objectionable deed. Neither can a purchaser, who after the lapse of ten years buys the land from the debtor, though the money be applied to creditors antedating the deed, hold it against the fraudulent grantee; for a subrogation to the rights of the creditors, who are themselves barred, could not avail him.⁹

The Kentucky doctrine of the statute is, that it tolls not the remedy only, but the right, and that a possession of the statutory length gives a "right of entry;" but to bring about such a result the several possessors, during the whole time of the bar, must regularly derive the title from each other.¹⁰

⁹Phillips v. Shipp, 81 Ky. 436; Dorsey v. Phillips, 84 Ky. 420; Brown v. Connell, 85 Ky. 403; more fully reasoned out in the opinions in 11 Ky. L. R. 427. In the first-named case, a suit by a judgment creditor to set aside a fraudulent conveyance, it was said the long and stubborn defense of the suit leading to the judgment was not such "obstruction" as would, under Art. IV, Sec. 9, save the action. But the bar must be pleaded to a suit for setting aside a fraudulent conveyance; the petition is not bad on demurrer for showing that the conveyance is over five years old, though it does not excuse the delay. (Hieronymous v. Marshall, 1 Bush, 508.) That the conveyance is recorded is not notice to the creditor within the meaning of the saving clause, and he may sue within five years after receiving actual notice. (Ward v. Thomas, 81 Ky. 452.) But

in Fritschler v. Keehler, 83 Ky. 78, the recording was held a strong circumstance for bringing notice home to the creditor, and he was barred in less than ten years without direct proof of other notice.

¹⁰Botts v. Shields' heirs, 3 Litt. 32-34, *arguendo*, if the lessors of the plaintiff had been in possession adverse to the elder patentee for twenty years, they would have become invested with his title. The rule is first applied in a case of chattels to a five years' possession in Stanley v. Earl, 5 Litt. 281, quoting Stokes v. Berry, Salk. 421, and Atkins v. Hord, 1 Burrow, 119, and is followed since in Chiles v. Jones, 4 Dana, 483; Breeding v. Taylor, 13 B. M. 482, and other ejectment cases, and said in McCracken Co. v. Mercantile Trust Co. (n. 6), to be now undisputed. See that case for the constitutional bearings and effects of the doctrine.

Limitation does not run in favor of a squatter on the public domain against the Commonwealth for land which it has never disposed of; hence it was held that limitation does not run against a patentee but from the date of his patent, nor by reason of a possession held by a squatter while the title was in the Commonwealth.¹¹ Yet by the Revised Statutes all the limitations prescribed in the chapter on that subject are made applicable to the Commonwealth, and so again by the General Statutes.¹² Even before such enactment the kingly exemption from prescription was denied to a municipal body seeking to regain a public highway. "If a citizen has been permitted to remain in continuous adverse possession of public ground or . . . part of a street . . . within his inclosures, or covered by his dwelling or other buildings for . . . twenty years, . . . such citizen will be thereby vested with the complete title;"¹³ and this, though as we have seen (*supra*, Chapter VII) the municipal body has no power to grant the ownership or free use of such a place. Under the present law a period of fifteen years must be read in place of twenty.

But the General Statutes have modified this doctrine by directing that the bar of limitation shall not run so as to convert a purpresture into a full ownership, except from the time when the party having or taking possession notifies the governing body of the city or town, or, in case of a county road, the County Court in writing, that his possession will be adverse.¹⁴

¹¹ *Higginbotham v. Fishback*, 1 A. K. Mar. 506: "As plaintiff's patent is not twenty years old, there can be no limitation."

¹² Rev. St., Ch. 63, Art. III, Sec. 9; G. St., Ch. 71, Art. III, Sec. 10. The article refers otherwise to limitation in actions not for land; but the section is general. No cases arising under it are reported; but in *Marshall v. M'Daniel*, 12 Bush, 3, there is a query assuming the old law to be in force. Perhaps that law can be kept alive by insisting that the Commonwealth

can not be disseized. In two old cases, *Jarboe v. McAtee*, 7 B. M. 280, and *Wickliffe v. Ensor*, 9 B. M. 259, it was said, that after a possession of fifty (or thirty-eight) years a grant from the Commonwealth will be presumed.

¹³ *Dudley v. Trustees of Frankfort*, 12 B. M. 610, 611. Same principle recognized, but not enforced, in *Rowan v. Trustees of Portland*, 8 B. M. 259, and *Alves v. Trustees of Henderson*, 16 B. M. 131.

¹⁴ Ch. 71, Art. V, Secs. 1 and 2.

An outstanding life estate which prevents the bringing of an action also keeps the statute from running (see exception *infra*, Section 101) even in favor of a contingent remainder-man, since the Revised or General Statutes do not allow a remainder to fail for the want of a particular estate to support it. Nice questions may arise under the deeds of married women.¹⁵ Where the deed of a *feme covert* was void, because the husband did not join, the possession taken under it was wrongful from the beginning, and the statute began to run except as far as it was modified by her disability.¹⁶

A widow, who during coverture has conveyed her lands or chattels real, while of full age, with the assent of her husband, and has acknowledged the deed before the proper officer, has only three years given to her when she becomes discovert, and a like time is given to her heirs and devisees, but only one year to her vendees, to recover back such lands or leaseholds; which means evidently where the conveyance is bad on account of informality in the acknowledgment or of failure to record it.¹⁷ Probably, if the ground of recovery was fraud or mistake, she would be allowed as long a time (from five to ten years) as persons *sui juris*. Nor is this section applicable to dower, which is barred only in fifteen years, even where the right is based only on a flaw in a certificate of acknowledgment. No length of time bars the tenant in possession from his bill to quiet the title; and by analogy no statutory bar is applied to the suit which a reversioner or remainder-man may bring in equity, while the life estate is outstanding, to have his future rights declared.¹⁸

¹⁵ G. St., Ch. 63, Art. I, Sec. 11. The rule is expressly applied to a sale by the husband alone of the wife's land, before the married women's act of 1846, in *Stephens v. McCormick*, 5 Bush, 181.

¹⁶ *Dell v. Little*, 82 Ky. 147.

¹⁷ G. St., Ch. 71, Art. I, Sec. 6. The following sections (7 and 8) extend the time for bringing suit upon such grounds to not exceeding ten years: (1) If the woman be of unsound mind,

when she becomes discovert, three years after the removal of the disability; (2) or if she dies covert, and all her heirs are under disability, for three years' after the disability is removed from one of them.

¹⁸ *Kellar v. Stanley*, 87 Ky. 240. The ten years' bar of all non-enumerated actions was held inapplicable for reasons which will also exclude the fifteen years' bar.

The limitation against the purchaser at an execution sale runs from the time when he was entitled to have his deed from the sheriff; to let it run from the delivery of the deed at a later day would lead to dangerous delays and the insecurity of land titles.¹⁹

Where a patent or other deed is made to some one misstating his name (*e. g.*, Josiah in place of Isaiah), the person intended has the legal title notwithstanding the misnomer; and a suit between him or his heirs and a person happening to bear the wrong name, or those claiming under the latter, is not to be considered as a proceeding to correct the mistake; hence the limitation does not run from the date of the deed, but only from the time when the parties availing themselves of the misnomer took possession.²⁰

The exception in favor of continuing trusts²¹ was invoked in a very late case. In 1849 father and son had four land warrants, on which the latter took out four patents in his own name, two to be held in trust for the father. The father died in 1853, appointing the son his executor, but left the patented lands to his wife for life, remainder to a younger son. The wife died in 1884. Some years thereafter the younger son's children brought suit to have the lands conveyed to them. The court met the plea of lapse of time by the exception of a continuing trust, rather than by referring to the outstanding life estate, and adjudged a conveyance.²²

NOTE.—There are old cases holding that an unexecuted judgment in ejectment does not stop the bar, which had a meaning only when, through the expiration of the demise, such a judgment became unavailable. But even now a judgment against A. would not stop the running of the bar against B., who derived neither title nor possession from A.

SEC. 100. SAVING DISABILITIES. The law now in force as to disabilities is worded thus:

¹⁹ *Chalfin v. Malone*, 9 B. M. 496.

²⁰ *Russell's heirs v. Mark's heirs*, 3 Metc. 87.

²¹ Ch. 71, Art. IV, Sec. 20, also excepts a suit by vendee in possession for a deed.

²² *McQuerry v. Gilliland*, 11 Ky. L. R. 654. And, where the widow

and administratrix bought and occupied lands with the money of the estate, she was supposed to hold it only as doweress and in trust for all concerned, and limitation did not run against her. (*Clayton v. Clayton's ex'r*, 11 Ky. L. R. 472.)

“ If, at the time the right of any *person* to bring an action for the recovery of real estate *first* accrued, such *person* was an infant, married woman, or of unsound mind, then such person or the person claiming through him may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed.

“ The time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued, nor by reason of any disability of the heirs of the person to whom the right first accrued.”¹

The latter clause speaks for itself; it explains the words “ first accrued ” in that which precedes it, and in the first and main section of the chapter.

But under the former section the two questions arise :

1. If, at time of the first accrual of the right of action (when the adverse possession of a wrongful occupant begins), there are several joint owners, and all of them under some disability, are they all protected against the running of the statute till the disability is removed from all, and for three years thereafter?

2. If, at the time of the first accrual, there are several joint owners, some under a disability and some not, does the bar of the statute run against the former as well as against the latter, or can the former save their respective shares?

In the limitation act of 1796,² which with some amendments was in force till 1852, the clause as to disabilities opened with the words: “ If any person *or persons* entitled to such writ or writs, or to such right,” and relying mainly on the addition of the two words “ or persons,” the Court of Appeals held, in a number of cases reaching from 1817 to 1848,³ that the statute gave its saving virtue to several joint tenants or coparceners only, if at the time when the title came to them

¹ G. St., Ch. 71, Art. I, Secs. 2, 3, copied from Rev. St., Ch. 63, Art. I, Secs. 3 and 4. The R. S. were even more explicit against the cumulating of disabilities.

² M. and B. II, 1127; Litt. L. Ky. I, 380.

³ From *Dickey v. Armstrong's devisees*, 1 A. K. Mar. 39, to *Riggs v. Dooley*, 7 B. M. 236.

they were all under disability, otherwise to none of them ; but if to all, the bar did not become complete till the disability and additional time had run against all of them. In short, either all the claimants are barred or none, unless indeed when they are tenants in common, each of whom can sue separately for his share ; but as the co-plaintiffs in ejectment are in most cases coparceners (co-heirs) or joint tenants (co-devisees), a tenancy in common will seldom happen unless before the accrual of the right of entry one coparcener sells out, in which case the remaining coparceners become tenants in common with the vendee, and are entitled to their own saving disability.⁴

But as these words “ or persons ” are left out, both in the Revised and in the General Statutes, it should be thought that they were purposely left out to remove the inference that had been drawn from them, especially as the Code of Practice of 1854 allows every man to bring his separate action to guard his own interest, making those joined with him in interest, but unwilling to join in the suit, parties defendant thereto (Section 36, now 24), and thus takes away all ground of distinction between coparceners, etc., and tenants in common ; and every claimant of land should now be dealt with according to his own interest. But a case arose under the Revised Statutes of a right of entry accruing to three coparceners, all under age, and suit was brought by them more than fifteen years after the accrual, and more than three years after the oldest coparcener came of age. The court (J. Williams) held that she was not barred any more than the two younger coparceners,⁵ and gave for its reason the long line of precedents under the act of 1796, remarking that the wording in the Revised Statutes is substantially the same as in the act of 1796, and that the legislature would have changed the wording of the law if it had been dissatisfied with the old construction. For this Messrs. Bullitt and Feland, in their notes to the General Statutes,⁶ take the court quite severely to task, and point out some strong and clearly intentional differences between the old and the new statute ; but in their criticism they fail themselves to

⁴ Riggs v. Dooley, *ubi supra*.

⁵ Moore v. Calvert, 6 Bush, 356.

⁶ See p. 884 of their edition of 1887.

point out the most material difference as to the point in hand—the omission of the words “or persons”—on which the Court of Appeals had in 1817 founded its opinion, that the bar of the statute begins to run and ends at the same time against all coparceners or joint tenants.

The question whether under the present statute the bar will run from the start against co-heirs or co-devisees, some of whom are and some of whom are not under disabilities, so as to cut out the former, has not come before the Court of Appeals in any reported case, and it is hard to say how it would be solved by that tribunal.

SEC. 101. THE THIRTY YEARS' BAR. “The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right of action first accrued to the plaintiff, or the person through whom he claims, by the reason of any death, or the existence or continuance of any disability whatever.”¹

It is the misfortune of the writer that he disagrees radically with the course of decisions made by the Court of Appeals on this section of the statute. The word “disability” used in it means, in the humble opinion of the writer, a want of power to sue, not a want of power to pass the title. Consider only that the limitation act of 1796 made the plaintiff's absence from the State (the old “beyond the seas”) and his imprisonment grounds for suspending the statutory bar, to make this evident. Yet in a line of cases, coming down from 1881, the court has laid down this as the true meaning of the statute, that if a person under disability does an act which but for such disability would pass the title, the person claiming under that act will thirty years thereafter have a good title, although the cause of action, by reason of an outstanding life estate, may not have accrued but on the very eve of bringing the action. Three decisions were given against the plaintiffs, which can be justified by giving this meaning to “disability;”²

¹ G. St., Ch. 71, Art. I, Sec. 4; R. St., Ch. 63, Art. I, Sec. 5.

Mantle v. Beal, 82 Ky. 122; Burgess v. Bradley, 10 Ky. L. R. 701 (to be reported).

² Suter v. Medlock 80 Ky. 100; Conner v. Downer, 4 Bush,

but the doctrine was not fully avowed till March, 1889, in an opinion overruling the plea of the statute, and remarkable for unsettling a possession of seventy-two years.³ The husband alone had by a written instrument of February, 1817, given possession to those under whom defendants claimed. He died in 1870 or 1871. In less than fifteen years from the day of his death the heirs of the wife (children of the husband by a second wife, inheriting as half-brothers from her only child) brought suit and recovered. The decision was clearly right; the limitation law did not apply. But the case was distinguished from the three preceding ones on the ground that in these the married woman had in some way joined in the act under which the possession was given and held.

In the preceding cases it had been said that as soon as the husband and wife put a purchaser into possession by an instrument ineffectual against the latter, she would have her action at once. But these instruments were written and possession given before the married woman's act of 1846; the husband's deed or contract carried the freehold, as the law then stood, for the period of the joint lives and his own curtesy, and if the wife or her heirs had sued before his death they must have been defeated. These instruments were not common law conveyances, creating a fee by disseizin—in fact, none such then existed in Kentucky; they transferred the husband's right and no more.

In one case the husband outlived the transfer of possession by more than thirty years; the wife's heirs thus had not one moment in which they could sue. In three such cases plaintiffs who had delayed their suits much less than fifteen years were turned out of court under the thirty years' law.

In a case in which the thirty years had not run out, the following language was used:⁴

“The doctrine that one obtaining possession, under the husband, of the wife's land must restore that possession at the

682, is quoted with this line of cases. It was the first case decided in favor of the thirty years' bar, and is clearly right, for the court held that for want of a *pedis possessio* there was no cur-

tesy, and so the time of limitation had run.

³ Butler v. McMillan, 11 Ky. L. R. 23 (to be reported).

⁴ Bransom v. Thomas, 81 Ky. 387.

husband's death, applies still, *unless the thirty years' statute protects him.*"

Whence this exception? The doctrine by which the void instrument of a person under disability becomes good by a possession of thirty years, as avowed in 1889, seems to the writer not only foreign to the statute, but an act plainly expressing such a doctrine would, as far as it acts upon antecedent instruments, be clearly unconstitutional under the often quoted decision of *Pearce's heirs v. Patton*. Such a statute could hardly be called a limitation law.

The thirty years' bar was also enforced upon plaintiffs who had indeed for that length of time held some right of action concerning the land, but not the right for which they sued. A testator had given a farm to his widow "for the support of all the family and to be divided between her children at her discretion," naming eight children. Claiming the power, she sold the farm for \$36,000. It does not appear whether she used the money in the support of the children. Shortly after her death, but a little over thirty years after her deed, the children sued for the farm, but were defeated on the ground that the words "for the support of the family" in the will gave to them an immediate cause of action against the holders of the land.⁵ But the right to a support is not always a right to the full profits, let alone to the possession, and at any rate the children's interest in the land was increased by the death of their mother; as to this increase at least there was a new cause of action at her death.

It is curious that the lapse of thirty-six years should have been dwelt upon with some feeling in a case to which the bar was applied, while in the one case in which the court refused to do so the possession had lasted nearly seventy years before any suit was brought to disturb it.

It is admitted that the action for dower only accrues upon the husband's death, and though he may have sold and given possession more than thirty years before his death, his widow is not thereby barred from suing for her dower within fifteen years after his death.⁶

⁵ *Stillwell v. Leavy*, 84 Ky. 379. ⁶ *Williams v. Williams*, 11 Ky. L. R. 608.

SEC. 102. ADVERSE POSSESSION. Before a party in possession of land can avail himself of the bar of the statute he must show that for the time therein named persons other than the plaintiff, or those through whom the plaintiff derives his title, have been in *possession* of the land ; though it is not necessary that those who thus possessed the land during the required length of time should have derived title from each other ;¹ only the possession must have been continuous,² and it must, during all the time, have been adverse, not amicable ; nor will occupancy by a squatter, who does not claim to hold under any one in particular, be always considered adverse.

The rules as to “adverse” or “amicable” possession are pretty much the same in Kentucky as elsewhere ; but a special branch of learning has sprung up for determining what is possession of wild lands and how far it extends.

A notorious claim, though exhibited by putting up a shanty or cabin³ and accompanied by occasional trespasses upon the land, such as the cutting of timber, or pasturing of stock, does not give such a possession⁴ as to justify an action of ejectment ; hence it does not, when continued for the statutory

¹Shannon v. Kinny, 1 A. K. Mar. 3, 5, where two previous occupants held under different titles and the first surrendered to the hostile demands of the second. But a tenant, who enters while the land is vacant, can not connect himself with a previous possession. (Griffith v. Dicken, 4 Dana, 561.) The possession of mere squatters, claiming no right, enures to the true owner as against a subsequent intruder, and will not be added to the time of the latter. (Bell v. Fry, 5 Dana, 341, 344.)

²“To bar an ejectment by time, the adverse possession must have been so continued for twenty years as to have furnished a cause of action every day during the whole period.” (Jones v. McCauley’s heirs, 2 Duvall, 14, 16.) And a judgment in ejectment for any part of a tract of which

the defendant was not at the time of the suit brought in actual possession is erroneous. (Moss v. Scott, 2 Dana, 271.) It was always the usage in Kentucky to limit the verdict in an ejectment to the land recoverable, and to the interest therein of the lessor of the plaintiff.

³Jones v. McCauley’s heirs, *ubi supra*. A small cabin had been built on the land in dispute, but was soon allowed to rot away. Wickliffe v. Ensor, 9 B. M. 253, 259, where the erection of a shanty, not occupied or put to use, was held not to amount to a continued possession, though it was evidently put up for that purpose.

⁴Ellicott v. Pearl, 10 Peters, 412, quoting Moss v. Scott, 2 Dana, 271. See *supra*, Sec. 66, n. 9.

period, bar the true owner. This doctrine grew up when such trespasses were carried on so often and so openly that no one looked upon them as acts of ownership or as indicating possession.

To inclose lands by fences, walls or hedges, and if an unfordable river forms one side of the tract, thus to inclose the other sides, is always deemed possession as long as the claimant by himself, his servant or tenant, resides or carries on work or business within the inclosure. But, as was said by the Supreme Court in a case coming up from Kentucky,⁵ beside the fencing or inclosure of land there are other modes of possession, "such as entering upon the land and making improvements thereon; raising a crop of corn, felling and cutting the trees thereon, etc., under color of title." Yet, in cases in which a wider possession is claimed unsuccessfully, it is always recognized as far as "the close."⁶ But even a fence may not give the legal benefits of possession over the ground on which it stands, if it has been put there secretly and with the intent of deceiving the owner of the ground.⁷ On the other hand, a river island needs no fencing; and if it is subject to overflows and therefore not habitable, the cutting of timber and grazing of cattle on it at certain seasons of the year may be all the possession of which it is capable, and will, if continued long enough, bar the outstanding title.⁸

The mere intention "to clear and use land" is immaterial; but when a substantial improvement is made, and such a one

⁵ *Caskey v. Lewis*, 15 B. M. 27. 32. Here an instruction was held erroneous, in which the jury was told that they might infer a possession, if the defendant entered on the land, made sugar on it from time to time, and cut and used timber and firewood from it. *Young v. Withers*, 8 Dana, 165: similar acts by the plaintiff do not interrupt the defendant's possession. *Braxdale v. Sweet*, 1 A. K. Mar. 105: the occasional cutting of timber insufficient. *Smith v. Mitchell*, *Ibid.* 208: occasionally camping on

the land to make sugar insufficient. *Smith v. Morrow*, 7 J. J. Mar, 446: cutting timber occasionally, at short intervals for twenty years, insufficient.

⁶ *Millar v. Humphries*, 2 A. K. Mar. 446; a case of trespass by possessor against true owner.

⁷ So held in a forcible entry case, *Henry v. Clark*, 4 Bibb, 426; it would probably have been held differently, if twenty years had elapsed after the fraudulent act.

⁸ *Webbs v. Hynes*, 9 B. M. 388.

seems in most cases indispensable in order to gain possession of "woodlands in the wilderness," the time will run from the beginning, not from the completion of the work.⁹

Listing the land for taxation does not help to make out a possession;¹⁰ though when there is a possession the assessment might show its extent, and perhaps its adverse character.

The distinction between adverse and amicable possession, as recognized by English and American courts, is this: that an amicable possessor is one who holds the land of another as his *quasi* tenant. Such tenancy may be terminated by the true owner by "notice to quit;" or the possessor may terminate it by notifying the true owner in some way of his hostile holding. The Kentucky cases assign this attitude of a *quasi* tenant, among others, to the vendee under an executory sale¹¹ who owes a sort of allegiance to the holder of the title, as we have already shown under the head of Champerty (*supra*, Section 66). But where a tract is held under an adverse title, the holder does not by an unenforcible parol agreement with the claimant to buy the latter's rights at a given price make his possession an amicable one.¹²

In a well-considered case which came before the Court of Appeals in 1857, the rule as to holders by executory contract is thus stated: "So long as M. (the grantor of the defendant) looked to the heirs for a title, the possession of his vendee was

⁹ Smith v. Morrow, 7 J. J. Mar. 442, 446.

¹⁰ And, *e converso*, Smith v. Morrow, 7 Mon. 239 (a case of forcible entry and detainer); failure to list is not evidence of abandonment of possession.

¹¹ First stated incidentally in Moore v. Farrow, 3 A. K. Mar. 41, 49. The executory vendee can not, by lapse of time, gain the legal title of his vendor. (Hawkins v. Page's heirs, 4 Mon. 136.) In Butts v. Chinn, 4 J. J. Mar. 641, the possession of the vendee under title bond was deemed that of the obligor on the bond, for

the purpose of estoppel, not of limitation. A doweress in possession also owes allegiance to the heirs: Kirk v. Nicholi's heirs, 2 J. J. Mar. 469, where it is said, "Possession *shall be held* according to the title under which it was acquired." It is not a case of limitations, but one where the adverse title was rejected without regard to its being good or being bad.

¹² Daniel v. Ellis, 1 A. K. Mar. 61, distinguished from Gay v. Moffitt, 2 Bibb, 506, where the tenant entered into a written contract agreeing to pay rent in certain contingencies.

in law deemed amicable, but so soon as the deed (giving date) was executed, which purported to convey to him the title of all the heirs, the possession (of the defendant) became adverse to the heirs and all other persons except M., his vendor, and after the execution of the deed by the heirs (to the defendant) his possession was adverse to all the world."¹³

Here is a case where an amicable possession becomes adverse. On the other hand, an adverse possession may become amicable whenever the possessor acknowledges the title of him that has the right of entry, and becomes his tenant or *quasi* tenant; but it is said that if one "owes allegiance to the title under which he holds the possession, the law does not permit him voluntarily to renounce it, but he is under obligations to adhere to it until it is legally ascertained that such title is not sufficient to protect him against the adverse claim."¹⁴ And while the tenant "under allegiance to one title" can not lend his possession to an opposing claimant, neither can he by purchasing an adverse claim change the character of his possession.¹⁵ But an older case¹⁶ quoted in support of the doctrine, states it less broadly: "the ancestor, more than five years before his death, purchased from the patentee another adverse claim, but as that might have been done merely for the purpose of quieting the possession, *and as no other circumstance is shown*, . . . his purchasing another claim can not *per se* . . . change the nature of his possession," it being implied that by showing a clear intent, the party "under allegiance" might have rendered his possession adverse. A somewhat later case, also quoted,¹⁷ sustains the doctrine more fully. It is by one of the authorities based on the statute which disallows the attornment of the tenant to a stranger.¹⁸

¹³ Gossom v. Donaldson, 18 B. M. 230, 239.

¹⁴ Fauntleroy's heirs v. Henderson, 12 B. M. 447, 456.

¹⁵ Norton v. Sanders, 1 Dana, 14. Same principle adjudged in Pleak v. Chambers, 7 B. M. 565, 567, and on a previous hearing in Chambers v. Pleak, 6 Dana, 431, following Myers v. Buford, 7 J. J. Mar. 250. The

tenant gains a bar of possession for his landlord, though he may illegally buy in an adverse claim.

¹⁶ Higginbotham v. Fishback, 1 A. K. Mar. 506 (under the old law by which a disseizin for five years and descent cast tolled the right of entry).

¹⁷ Botts v. Shields' heirs, 3 Litt. 32.

¹⁸ Meyers v. Buford, *ubi supra*; see Gen. Stat., Ch. 63, Art. I, Sec. 16.

SEC. 103. EXTENT OF POSSESSION. We often meet in cases dealing with this branch of the law the words "lap," or "interference," and "marked boundary."

Where two entries or patents come into conflict they never cover all of the same ground (unless it be in the sectionized country below the Tennessee River), and seldom (except in the case of "modern grants") is one claim wholly contained in the other and greater claim. Thus each grant or entry covers some land not touched by the other while a tract common to both is in dispute; and this tract is called the "interference," or, in homelier English, the "lap."

A "marked boundary" is one defined by the customary notches which are "blazed" by the surveyor (whether official or private) upon forest trees in making the survey of a tract. Where one of its sides is bounded by a natural object, such as a river or cliff, no "blazing" of forest trees is needed on that side. An island has, by its own nature, all the needful "marked boundaries."

Where an occupant has some ground under tillage or within an inclosure, it is often important to find how far his possession thus gained will be deemed to extend. As a rule, whoever claims land under a written instrument, describing the land, whether such instrument be an entry, survey, or patent, bringing the title out from the Commonwealth, or a deed, will, or title bond executed by a person or body politic, will be deemed in possession as far as the boundaries named in the writing, if he is in bodily possession of any part of the tract; *provided*, that no one else possesses by like clearing or inclosure any other part of the described tract.¹

In one case the Court of Appeals has enlarged this rule by allowing a settler, who had inclosed a small part of a tract, without having a written instrument to show the extent of his

¹ Young v. Dana, 8 Dana, 165, is the strongest among the many cases; for the possession was extended from the inclosure to the lines of two contiguous patents claimed by the

occupant, part of one only being inclosed. There is no difference here between a junior patent or an ineffectual deed. (Thomas v. Harrow, 4 Bibb, 563.)

possession under color of title, to extend his possession to a surveyed and "marked boundary."²

Where the possessor of land belonging to another accepts a deed to adjoining lands of the same owner, which he, however, does not occupy, he will be considered as being so far in possession of those lands as to justify an ejectment suit against him; it follows, that his possession, if held for fifteen years, will bar an ejectment to the lands so conveyed to him.³ But the possession of an inclosure can not be extended to other lands, held under the patent, but separated from the inclosure by other lands excluded from the grant.⁴

Before the Code of Practice parts of the same tract lying in several counties could not be recovered in the same action of ejectment, hence the possession in one county could not be extended to adjoining land in another; but, as the Code allows a single action in the court of either for the recovery of a tract lying in two counties, this rule has come to an end.⁵ Whether a man's possession will extend to the boundaries of his deed when he shows by outward acts (such as running his boundary lines) that he is mistaken about the extent of his claim, and believes land embraced in it to lie outside of his lines, is left in doubt by conflicting decisions.⁶

² Campbell v. Thomas, 9 B. M. 83. Four older cases are quoted by Judge Simpson for this doctrine of marked boundary; two of them hint at it faintly; the two others do not mention it at all. Judge Barbour, in his Digest, has, by enumerating these four cases along with Campbell v. Thomas under the head of Marked Boundary, given undue weight to the new rule. It has become customary with squatters, or settlers under void patents in the mountains, to "mark" a boundary of large extent on purpose to get title to the inclosed space in fifteen years. In the principal case the boundary had been marked with a view of complying with a law for the benefit of settlers, and was made in good faith. (There is, however, this strange

feature in the case, that the inclosure was outside of the lap, and the latter must have been within the marked boundary of the other party, the patentee; and the title should have drawn the possession to itself.) The marked boundaries are, however, recognized as bounding the possession, which is protected by the law of forcible entry and detainer. (Van Horne v. Tilley, 1 Mon. 50.)

³ Griffith v. Dicky, 2 B. M. 20.

⁴ Moses v. Gatliffe, 11 Ky. L. R. 356.

⁵ Harlan v. Howard, 79 Ky. 873. See C. P. of 1854, Sec. 93; of 1876, Sec. 62.

⁶ Hoskins v. Cox, 2 B. M. 303 (J. Marshal), upon a forcible entry. Baird v. Bull, 1 Duv. 384, on an ejectment suit; but the question hard-

Upon maxims taught by Lord Coke, it was held in Kentucky at an early day that a disseizin can not be presumed, and that if a junior patentee incloses a part of his undisputed land, his possession will not be extended to the "lap;"⁷ but if his inclosure be in whole or in part within the lap, it extends to the whole of it,⁸ unless within the statutory period the elder grantee also occupies part of the lap. If the elder grantee is in possession of a part of the lap, the junior grantee can gain a possession upon it only as far as his inclosure, tillage, or improvement reaches, even if the elder grantee, the true owner, makes his inclosure on the "lap" or land in dispute later than the junior claimant, but before the latter's title has ripened by time into a right of entry, the junior's possession is thereby narrowed to its bodily limits.⁹ No such effect is worked by the entry of the true owner on any part of his grant outside of the lap.¹⁰ All this applies as well to other conflicting claims as to those which arise under different patents.

The claimant of the fee can gain a possession that will ripen into a right of entry, through his tenant; and, if he demises the whole tract which he claims, the tenant's possession will extend over all of it just as his own possession would; while, if he demises a part, the tenant's possession will protect only that part.¹¹ Where a claimant in possession sells a part of the tract, and there is afterward an entry on a part of the land retained, the possession taken will not extend over the part sold,

ly arises, as the constructive possessor of the ignored slip was the true owner, if not otherwise, by the forty years' possession of his vendor, who did not run shorter lines by mistake.

⁷ Trimble v. Smith, 4 Bibb, 257, quoting Co. Litt. 15, b.

⁸ Fox v. Hinton, 4 Bibb, 559, first resolution.

⁹ Gregory v. Ford, 5 B. M. 471, 478.

¹⁰ Fox v. Hinton, *ubi supra*, second resolution, quoting Co. Litt. 252.

¹¹ "A landlord who settles a tenant *without bounds* upon a tract is in pos-

session to the limits of his claim." (Jones v. Chiles, 2 Dana, 25, 29.) *Contra*: "A patentee extending shelter to an occupant whose possession is meted and bounded, acquires thereby possession only to the limits of the occupant's claim." (*Ibid.*) But in Hinton v. Fox, 3 Litt. 330, fifth resolution, it is said that the law gives to the tenant of a farm the right of estovers in the adjoining woodlands, and his exercise of that right would extend the possession of his landlord over them.

there having been a "severance."¹² A vendee by executory contract is a *quasi* tenant, and his possession has the like effect as that of a lessee. Where A. buys a tract belonging to C. and his coparceners, pending a suit by a creditor of C. to have his share laid off and sold for debt, and B. subsequently buys it under the decree and takes a commissioner's deed, A.'s possession is construed to extend over the whole tract in accordance with his deed, adverse to B., though his improvement be on a part outside of the parcel bought by B.¹³ So, likewise, where one of several joint owners, or the vendee of one of them, takes possession of a part of the tract held jointly, expecting to have it allotted to him, the rest remaining vacant, the possession thus taken enures to all the owners, and reaches out over the whole tract.¹⁴

SEC. 104. THE SEVEN YEARS' LIMITATION. The land system, which we have sketched in a former chapter, had led by the year 1809 to such crying evils that, for the benefit of families actually living on lands in dispute, a more heroic remedy than the ordinary limitation law seemed urgently needed. In the preamble of the act then passed¹ these evils are eloquently set forth. The act is re-enacted with unimportant changes in the Revised and General Statutes.

The two requisites for bringing the occupant under the seven years' law are these: *First*, his title must be good in every other respect except this one of flowing from the Commonwealth, when the latter had already parted with the estate; *second*, he, or his privies in title, must not only have had the possession of the land, but been "settled" on it, that is, have

¹² Creighton v. Bilbo, 1 Mon. 138. This is, as far as we can find, the only case where the junior patentee, relying on the older "entry" (*supra*, Secs. 51, 54), *being out of possession*, sued the holder of the older grant in equity. As such a suit might be brought for a conveyance against the holder of the legal title, irrespective of possession, it might have been held that the bar of time should have run

against the equitable claimant, though his adversary was not in possession for twenty years. But the court treated the bill in equity as a simple ejectment bill, to be defeated only by twenty years of adverse possession.

¹³ Gossom v. Donaldson, 18 B. M. 230, 240.

¹⁴ Jones v. Chiles, 7 Dana, 528, 535.

¹ M. and B. Stat., II, 1141; Litt. Laws Ky., IV, 55.

lived on it for seven years after the derivation of their title from the Commonwealth.²

The instrument on which the occupant relying on the seven years' law rests is, of course, the younger entry, survey, or patent, otherwise there need be no limitation; but it must not be void. We have heretofore³ pointed out in what cases unlawful entries and surveys, and especially unlawful patents are void, and found this harsh rule to apply mainly to patents under the county warrant laws beginning in 1835, which, as far as they are laid on lands not then vacant, are denounced as "null and void."⁴ Hence a grant under these laws either gives a good title, or it does not even confer that shadow of title which is demanded under the seven years' law. Though the defendant's title must come by way of a "record" from the Commonwealth, it need not be derived from the patentee by recorded deeds; there may be equitable transfers, and a parol lease may be the last link in the chain.⁵

The word "settlement" was at first held equivalent to cultivation, but was soon defined as "dwelling" or "domicil."⁶ While the change in the statute may no longer exclude a resi-

²"No action at law or in equity shall be brought under . . . an adverse, interfering entry, survey, or patent, to recover the title or possession from an occupant where he, or the person under whom he claims, has a connected title thereto in law or in equity, deducible of record from the Commonwealth, and has . . . an actual occupancy of the same by settlement thereon for seven years before the commencement of the action; and such possession shall bar and toll the right of entry into such land by any person under an adverse title or claim, and . . . shall vest the title in the occupant or his vendee." (Gen. Stat., Ch. 71, Art. II.) The old law contained a clause, here left out, and enforced in some of the older cases, "where the settler shall have acquired such title or claim after the time of

the settlement made, the limitation shall begin to run only from the time of acquiring such title or claim." (See *Hunter v. Ayres*, 15 B. M. 210, 216.) This omission must have some force.

³ Secs. 56 and 57.

⁴ *McMillan, v. Hutcheson*, 4 Bush, 613. The same rules apply to the statute in favor of occupying claimants, *supra*, Sec. 84.

⁵ *Poage v. Chinn*, 4 Bush, 50, 54. But a mere claim to hold under the junior patentee or his assigns, without a contract connecting the defendant with such title, is not enough. (*Ibid.* p. 58.)

⁶ The word "residence" is first used in *Hog v. Perry*, 1 Litt. 178. The construction is plainly set forth in *May v. Jones*, 4 Litt. 21, 22, and has been followed ever since.

dent, who within the seven years purchases the title of the junior patentee, from the benefits of the statute, it is nevertheless clear that such junior patent (or other original basis of right) must be seven years old before the bringing of the suit; in other words, that the residence of a squatter on what he supposes the public domain, but what is really the property of a former patentee, can not be counted into the seven years.

The residence during the seven years may have been had by several privies in estate, as ancestor and heir, vendor and vendee, landlord and tenant, and the terms of residence will be added up.⁷ It was said in one case that the seven years' bar can be allowed only against an elder "entry, survey, or patent," but not against a statutory grant.⁸

Whenever the defendant can bring himself within the seven years' law, he may retain not only his inclosure within which he dwells, but the whole tract of which that residence forms a part, on the same principles as he might protect the whole tract under the twenty (now fifteen) years' law;⁹ that is, the "settlement" must be within the lap or interference.¹⁰

A saving is made by this law¹¹ in favor of "an infant, a married woman, (one) of unsound mind, or out of the United States in the employment of the United States or of this State, at the time the cause of action accrued," and gives seven years after the removal of such disability; "but the disability of one of several claimants shall save only his own right, and not that of another.

⁷ White v. Bates, 7 J. J. Mar. 538, 542.

⁸ Trustees Ky. Seminary v. Payne, 8 Mon. 161, 164.

⁹ Poage v. Chinn, 4 Dana, 50, 57.

¹⁰ Hite's heirs v. Shrader, 3 Litt. 444.

¹¹ Latter part of the one section of Chapter 71, Article II.

BOOK THIRD.

OTHER RIGHTS OF PROPERTY.

CHAPTER XVI.

THE TRANSFER OF PERSONALTY.

SEC. 105. Devolution on Personal Representatives.

SEC. 106. Distribution and Advancements.

SEC. 107. Legacies.

SEC. 108. Gifts *Inter Vivos* or *Mortis Causa*.

SEC. 109. Marital Rights in Personalty.

SEC. 110. Requisites of Sale.

SEC. 111. Sale Under Process of Law.

SEC. 112. Limitation in Suits for Chattels.

NOTE.—The law of Kentucky especially applicable to personalty will be treated in this book, as far as it lies within the scope of the work; also some of those rules of equity, not heretofore discussed, as to priorities in property and effects of all kinds, and the laws concerning fraudulent conveyances, and for preventing preferences among creditors; also certain trusts and “fraud and mistake.”

SECTION 105. DEVOLUTION ON PERSONAL REPRESENTATIVES. In all countries governed by the common law, and so in Kentucky, the personal estate of a decedent, upon his death, vests in his executor or administrator in trust for the legatees, distributees, and creditors. The manner of appointment and of qualifying such representatives, and most of their duties, are regulated by the written law.¹

¹ Gen. Stat., Ch. 39, Art. I, being devoted to the powers and duties of personal representatives, but mainly of executors; Art. II, to the mode of appointment, bond, oath, responsibilities, in the main, of administrators. Many sections, however, apply to both classes of representatives.

The person named in the will as executor can not act (except to bury the testator, pay for the funeral, and "preserve" the estate) till the will is probated, and until he has qualified in the court probating the will. An executor, or an administrator with the will annexed, takes an oath and gives bond; the former may by a request in the will be excused from giving sureties on his bond; but even in case of such a request the County Court may for good cause, with or without the motion of an interested party, require it. Though called a bond, the instrument is an unlimited covenant. It is signed by the executor, or administrator *c. t. a.*, and surety or sureties, attested by the clerk, and "carefully kept" by the latter. Its obligation will be discussed elsewhere. A certified copy of the order appointing and qualifying a personal representative is a sufficient proof of his title. The executor of an executor has no authority over the first estate, but when an executor dies the estate falls to an administrator *de bonis non cum testamento annexo*. An administrator *c. t. a.* is appointed by the County Court when no executor is named in the will, or when all that are named fail to qualify; and preference should be given to the person having the best right to administer in case of intestacy; and such appointment may be made temporarily if the named executors are under age, though by special request in the will an executor may qualify and act while an infant. *A married woman can not be appointed executor or administrator.* And the representative character of a woman ceases at the moment of her marriage, and does not pass to her husband. When thus, or otherwise, the powers of a representative cease, an administrator *de bonis non* is appointed. If the executors named in the will refuse to act, and no one else will undertake the estate, the court shall, after a lapse of three months, give the administration to the public administrator of the county, and if there be none, to the sheriff, who shall have all the powers of a personal representative, and these shall not expire with his term of office as sheriff. "If a personal representative shall reside out of the State, or become insane, or bankrupt, or insolvent, or in failing circumstances, the court shall remove him"—in some cases upon ten days'

notice; and whenever there is no representative the court shall appoint one. During a will contest, or in other cases of delay, a "curator" may be appointed, in whom the personalty vests, but who has no power to pay debts, legacies, or distributable shares. (Article II, Sections 1, 2, 3, 4, 5, 6, 7, 11, 12, 14, 16, 17, 18, 19, 20, 21.)

The same court which would have jurisdiction to probate a decedent's will may appoint an administrator in case of intestacy, but no original administration *can* be granted more than twenty years after the decedent's death. The court shall prefer the relatives who apply; first, the surviving husband or wife, then other distributees, or "one or more of them whom the court shall judge will best manage the estate." If no relatives apply at the second term of court, administration shall be given to a creditor, or to any other person. Upon the establishment of a will the administration ceases, and the estate passes to a representative who will execute the will. The administrator, when appointed, must take an oath and give bond, or, rather, an unlimited covenant, to be signed by him and his surety or sureties, and to be attested and carefully kept by the clerk. If his sureties become insufficient, a personal representative may be required to give an additional bond, or upon the demand of his sureties who wish to be released he may be ruled to give a new bond, and may in either case be removed for failure to furnish such additional or new bond. (Article II, Sections 1, 2, 3, 4, 5, 9, 10, 12, 13.)

All sales of personal estate made by a personal representative shall stand good though his appointment be afterward set aside, or his letters revoked, or the will which he was to execute turned out invalid, if there was good faith in the purchaser. (*Ibid.*, Section 14.)

The personal representatives shall sell the goods (other than specific legacies) liable to perish, to be consumed, or to become worse, at auction, upon a credit of from three to twelve months, and, if needful to pay debts, all other goods. If the testator so direct, the estate (unless for debts) need not be sold. (Sections 17, 19, 20.)

Land held *pur autre vie* shall upon the death of the holder

pass as personalty; also all emblements on the lands of a person dying after March first, and severed before the last of December; but all emblements growing on the land on the last of December and before March first, when the owner dies in the meanwhile, go with the land. The lessee of a tenant for life, who dies after March first, may hold under his lease to the end of December, paying a reasonable rent to the remainder-man. (This applies, of course, to lands held in husbandry, not to city lots.) Rent not due, at the death of the holder of an uncertain estate, to him and those coming in after him, shall be apportioned, unless the will creating the estates direct otherwise. (Sections 26, 27, 28, 29, 30.)

Non-resident representatives of persons dying as non-residents, may, on giving bond, sue for debts in this Commonwealth. The bond is conditioned to pay any debt of the decedent to a resident of this State to the amount of assets here received. (The bond is mentioned twice, as if one were to be given before action, another before judgment; but this is hardly meant.) But if a representative qualify in this State, he alone can bring suits. (Sections 43, 44, 45.)

A representative can only resign after settling his accounts, in which case the court shall order him to deliver the decedent's estate to his successor. (Section 46.)

A public administrator (in the General Statutes it was a public administrator and guardian) shall be appointed by the County Judge in every county, to whom all estates shall be committed for whom no one applies. (Sections 47, as amended, 48, 49, 50.)

In suits to settle decedent's estates the court may order the sale of choses in action. (Section 51.) The commission to personal representative is five per cent. (Section 51, as amended by act of March 17, 1876.²)

The other parts of the chapter treat of the liabilities of the representative and of his sureties, of the powers over the testator's lands, which an executor or an administrator *c. t. a.* may wield (see *supra*, Section 65) to the marshaling of assets, interest on debts, to proof of debts and mode of procedure.

² B. and F. Gen. Stat., p. 608.

The foremost factor in the title to the estate is the jurisdiction of the court issuing the "letters." We have shown, at the end of Section 64, what County Court may prove a will, and by reference, as shown above, the same court may grant "letters." It was held at one time that lands alone belonging to a decedent dying abroad would not give jurisdiction to the County Court of the *situs* to appoint; but this view has been overruled, and land without chattels or effects is now held enough to give jurisdiction in such a case.³ Goods brought into the State after the non-resident's death do not give jurisdiction; the ownership of such goods remains in the foreign representative.⁴

But, as shown in Section 78, nothing appearing to the contrary, the appointing County Court has the presumption in its favor; thus an appointment implies that there was a vacancy.⁵ The powers of a female representative, appointed or qualified in Kentucky, cease with her marriage; she and her husband can only act as executors of their own wrong, and as such they may have a settlement in the County Court.⁶ The rule is statutory and does not affect a foreign executrix who is sued in this State; it is presumed that the common law rule, not taking from her her representative character, is the law of each sister State.⁷

The administrator's right at law to recover chattels, or even money, in the hands of the widow or other distributee, can not be met by claims to her or his share, for such share is recoverable only after the estate is collected and settled. But the right to sue a former representative for a *devastavit*, or for the balance remaining in his hands, does not go to the administrator *de bonis non*; it must be exercised by the distributees (if the creditors are satisfied)⁸, notwithstanding an act of January 21, 1856, which is re-enacted as Section 46, of Article II, in the General Statutes; for the estate to be delivered by the

³ Thum v. Gresham, 2 Metc. 306, overruled in Hyatt v. James, 8 Bush, 9.

⁴ Embry v. Miller, 1 A. K. Mar. 300.

⁵ Warfield v. Brand's adm'r, 18

Bush, 77, 87.

⁶ Duhme v. Young, 8 Bush, 348.

⁷ Moss v. Rowland, *Ibid.* 506.

⁸ Cook v. Burton, 5 Bush, 64; Warfield v. Brand's adm'r, 18 Bush, 77, 89.

resigning representative is, as at common law, to be understood as that only which is "unadministered," that is, in kind and unchanged. It is plain that a foreign administrator on the estate of one who died as a resident of Kentucky can not bring an action here.⁹ A foreign administrator, whether of the estate of a Kentuckian or of any other person who comes to and settles in Kentucky, may be sued in Kentucky by the persons entitled for the assets in his hands, his liability to be measured by the laws of the State in which he is appointed,¹⁰ not, however, when he has not become a resident of this State.¹¹ There seems to be no distinction in these matters between a foreign executor and a foreign administrator.

As to the measure and contents of the personal estate, it has been held that rents of land accruing after the decedent's death are not assets, and when he was the owner in fee, will, notwithstanding the section quoted, go to the heir; but upon the death of an owner whose estate comes to an end with his life, such rents are apportioned (according to length of time) in accordance with that section, between his personal representative and those in remainder, reversion, or reverter.¹² Where land is let on shares by a life tenant, his share of the crop after deducting the seed furnished by him, which must be set aside to his estate first, is rent, and should be apportioned between that estate and those in remainder.¹³ Rents arising after the owner's death, and while the land is in the hands of heirs or devisees, are not assets at all, or liable to creditors; even rents accruing after a settlement suit has been brought.¹⁴ Remainder interests in chattels, though they be subject to a contingency, are yet assets.¹⁵

Where a representative transfers a note which is part of the assets unlawfully, though he might be estopped himself from

⁹ Conner v. Paul, 12 Bush, 144.

¹⁰ Manion's adm'r v. Titsworth, 18 B. M. 582, relying upon Dorsey's ex'r v. Dorsey's adm'rs, 5 J. J. Mar. 280; Atchison's heirs v. Lindsey, 6 B. M. 86.

¹¹ Baker v. Smith, 3 Metc. 264.

¹² Rank v. Hill's adm'r, 8 Bush, 66.

¹³ Redmon v. Bedford, 80 Ky. 13.

¹⁴ Ball v. First Nat. Bank, 80 Ky. 501; intimating that in case of threatened waste the creditors might reach the rents through a receivership.

¹⁵ Bowling v. Dobyns, 5 Dana, 484, 445. (See also Grayson v. Tyler, 80 Ky. 358.)

reclaiming it, an administrator *de bonis non* would not be so estopped, but can sue the wrongful assignee for the note or its value, such note being "assets unadministered."¹⁶

The statutory allowance may be lessened by the provisions of a will by which the executor is bound, if he acts under it.¹⁷ But where the sum named in the will is exhausted by the first acting executor who administers in part only, his successor who has to settle up the estate, ought to have his commission.¹⁸ By agreement with distributees or legatees the representative may give up his compensation in whole or in part: no public policy forbids such an agreement.¹⁹

SEC. 106. DISTRIBUTION AND ADVANCEMENTS. The General Statutes point out five respects in which the distribution of personal estate differs from the course of descent of lands (for which see *supra*, Section 58), and it differs in these only.¹

1. The estate of an infant is distributed as if he was an adult.

2. An alien may be a distributee.

3. A husband has the whole surplus of his dead wife.

4. The widow has one third when there is issue; one half when there is none. And the widow renouncing the husband's will may always have her distributable share.

5. A long list of articles "are exempt from distribution and sale, and shall be set apart to the widow or infant child or children, by the appraisers of an estate of an intestate," being in the main the same articles that are set aside from execution or attachment.² The articles or sums named on behalf of "each in-

¹⁶ Reed v. Reeves' adm'r, 18 Bush, 447.

¹⁷ Brown v. Brown, 6 Bush, 648.

¹⁸ Young v. Smith, 9 Bush, 421.

¹⁹ Bate v. Bate, 11 Bush, 689, where an adm'r agreed to charge nothing for his services.

¹ Gen. Stat., Ch. 81, Secs. 11, 12.

² Two horses, or one horse and yoke of oxen, and, if not on hand, other property or money not to exceed \$100 per head; two cows and calves; if none, other property or money not

to exceed \$20 for each cow and calf; all the poultry on hand; if none, other property or money not to exceed \$5; all the spun yarn and manufactured cloth and carpeting manufactured by the family necessary for its use; if none, in lieu thereof other property or money not to exceed \$20; all of the wearing apparel; the family Bible and one table, or in lieu of the family Bible and table, \$3 each; one loom, spinning wheel, and cards, and in lieu thereof, either money or property not

fant child" are given to the widow only on account of children living with her. The articles given to the widow in her own right, and on account of each child, must be stated separately. The articles are not set aside to the widow when there is a will which disposes of them otherwise; but the widow may renounce the will and thus have those articles as well as her dower and distributive share. By living in adultery the widow (unless there be condonation) forfeits her distributable share and enumerated articles,³ and a husband who separates from his wife and lives apart from her in adultery loses his rights as distributee.⁴ A divorce *a vinculo* makes an end of "distribution" as well as of curtesy and dower.⁵ The cor-

to exceed \$15; two beds, bedding, and furniture; if not on hand, either property or money not to exceed \$40 in value each; one half dozen plates, one half dozen cups and saucers, one coffee pot, one tea pot, one half dozen knives and forks, one oven and pot; if none on hand, other property or money not to exceed \$1 each; one cooking-stove and appendages and other cooking utensils, not exceeding \$25 in value; but if not on hand, nothing shall be set apart in lieu thereof; one half dozen chairs, or so many as shall not exceed \$8 in value; and if not on hand, other property or money not to exceed \$8; one saddle and appendages, together with bridle; and if not on hand, other property or money, in lieu thereof, not to exceed \$10; one plow and gear, or in lieu thereof, if none on hand, other property or money not to exceed \$10; one ax, one hoe; if none, other property or money not exceeding \$1 each; one sewing machine, if on hand; if not, nothing shall be set apart in lieu of it; a sufficiency of provisions, including breadstuffs, to sustain the widow and infant children residing with her one year; and if there is not a sufficiency of provisions on hand for

that purpose, then so much of the live stock suitable for that purpose, and of the growing crop, if any, as may be necessary to supply the deficiency; and if not on hand, other property or money, in lieu thereof, not exceeding \$50, for the support of the widow and each infant child living with her. If there is an infant child or children, and no mother surviving, there shall be set apart for the support of such infant child or children the articles aforesaid; and if such articles are not on hand, then other articles or money shall be set apart in lieu thereof; but in no case shall appraisers set apart, to either widow, or child, or children, property or money in lieu of the articles allowed by law of greater value in the aggregate than \$750. By an act of March 8, 1884, a wagon, or \$50 in lieu thereof, are added to the list of articles, but so that the total is not to exceed \$750 in value. See B. and F. General Statutes, p. 483.

³*Ibid.*, Sec. 13. *Quære*: How will such forfeiture affect infant children?

⁴*Ibid.*, Section 14.

⁵ Act of Feb. 16, 1874. (B. and F. General Statutes, p. 742.)

responding law in the Revised Statutes charged the widow with the articles thus set aside as against children not residing with her ; but the present law contains no clause to that effect, and it seems that the enumerated goods or money equivalent are given to the widow or infant children as a first claim upon the estate in all cases, and the residue is thereafter divided, and they then get their full share of such residue without regard to the articles already received alike, whether children, or ascendants, or collaterals, are the other distributees.⁶

The decisions on the course of descent, collected in Section 58, are applicable to the course of distribution.

The issue of an adopted child will, just like natural issue, reduce the widow's distributable share to one third.⁷

The word "heirs," not only in wills, but even in statutes, will often from the context appear to refer to personal estate, and will then be held to be equivalent to "distributees."

Under the statute discussed in Section 105, the widow and next of kin are not entitled to their distributive share until nine months have elapsed from the appointment of the administrator, nor can they demand payment then except against an indemnifying or refunding bond. By delivering the estate into court in a settlement suit, the administrator, of course, escapes all further liability ; but within five years after the grant of administration the court may demand such a bond from distributees or legatees before allowing them to draw their share.⁸

It is proper here to speak of advancements, though they apply now as much to the division of lands as to the distribution of personalty, in which they first took rise. Under the statute⁹ any property given or *devised* by a parent or grandparent shall be charged to the descendent receiving it, or those claiming through him (not, however, in favor of the widow), at the value when given, except "the maintaining or educating, or giving of money to a child or grandchild without any view to a portion or settlement in life."

⁶ Newman v. Winlock, 3 Bush, 241.

⁷ Atchison v. Atchison's ex'rs, 11 Ky. Law Rep. 708.

⁸ Gen. Stat., Ch. 81, Sec. 19; Ch. 39, Art. II, Sec. 11; C. P., Sec. 485.

⁹ Gen. Stat., Ch. 81, Secs. 15, 16.

Hence, if there is a partial intestacy, the undevised estate will be used to equalize those who are postponed in the will, and this a testator can only prevent by expressing his intent so plainly as in fact to dispose of his whole estate, and thus not dying intestate as to any part.¹⁰ Where a testator, after dividing his estate unequally, directed that the share of one son, if it lapsed, should go by the "law of descent and distribution," the share was adjudged to be a fund for equalizing a postponed child with the others; for the law of advancement is a part of that of descent and distribution,¹¹ and so where the testator devises to two sons land, and charges them with a sum of money, intimating that the land is more valuable, the sum of money is undevised estate and becomes a fund for equalizing the children. A devise of a thing to a child for life, with remainder to the issue of that child, and remainder over on failure to issue, or a fee defeasible on failure of issue, or in like manner of the issues and profits, will be charged at the value of the thing itself,¹² and a gift to a son-in-law during his daughter's life, and with no other motive than his being such daughter's husband, will be charged to the daughter or her issue; but such a gift to a son-in-law after the daughter's death, or to the grandchildren during the life of the intermediate parent, is looked upon as a bare gratuity.¹³ The advancement is valued as of the time when the gift is perfected by deed or delivery, though the property have been received and enjoyed long before.¹⁴ And a gift reserving a life estate

¹⁰ Clarkson v. Clarkson, 8 Bush, 655, where the testator divided his slaves by will, said of his land only that two named children should have no part therein, and said nothing as to the other personalty; held that the land was devised to the other children, but the personalty remained a fund out of which to equalize the children.

¹¹ Cole v. Palmer, 1 Bush, 371; Renaker v. Lafferty's adm'r, 5 Bush, 88.

¹² Bowles v. Winchester, 18 Bush, 1. But a life estate without remainder

to issue was in the same case charged at its table value.

¹³ Barber v. Taylor's heirs, 9 Dana, 86; Stevenson v. Martin, 11 Bush, 485.

¹⁴ Bowles v. Winchester, and Stevenson v. Martin, *ubi supra*. And where mortgaged land is given as an advancement by a warranty deed, leaving to the heir only the equity of redemption, he will be chargeable with that only, and may, subject to his share, sue the estate on the warranty. Polly's ex'rs v. Polly, 82 Ky. 64.

in the grantor is a good advancement, and is valued as of the time of his death.¹⁵ Where land is given, the rents can not be charged (for an advancement does not bear interest);¹⁶ but where the use alone is given, if it be for a "settlement in life," the rental value may be charged.¹⁷ While a devisee can not controvert the recital of advancements in a will, stated as a reason for lessening the amount left to him, the children are not estopped in the distribution of undevisee estate by the parent's declarations, in or out of the will, as to his intention,¹⁸ or as to the value of the advancements.¹⁹ The law itself says what shall be charged as an advancement, and at what rate. The exception as to money has been thus paraphrased: "money given for purposes of amusement, or health, or education and maintenance, or temporary enjoyment, and not with a view to its investment."²⁰ When the will devises land and is silent as to personalty, and the testator thereafter sells the land and mixes the proceeds with his personalty so as to adeem the devise, the personal estate thus increased is a fund for equalizing advancements.²¹

But where a son accepted from his father a sum of money as his full share of the estate, and receipted for it, and bound himself in the receipt never to set up a claim against him or his estate, he was estopped from any further claim as heir or distributee.²²

SEC. 107. LEGACIES. The common law rule by which the legatee does not gain the legal title to even a specific legacy, unless by the executor's consent, or through a decree against him, is the law in Kentucky. The rules for construing devises,

¹⁵ Hook v. Hook, 13 B. M. 526.

¹⁶ Montjoy v. Maginnis, 2 Duv. 187; Bowles v. Winchester, *u. s.*

¹⁷ Shawhan v. Shawhan, 10 Bush, 600.

¹⁸ Clark v. Clark, 17 B. M. 689, 707, where the father laid out \$500 for a son, expressly saying that he intended to give him that much more than his other children; held nevertheless chargeable. This is approved in Bowles v. Winchester, *u. s.*

¹⁹ Clarkson v. Clarkson, *ubi supra*.

²⁰ Clarke v. Clarke, *ubi supra*. In Bowles v. Winchester, \$15,000 given to three children for a pleasure trip were not charged. Money expended for schooling can not be turned into an advancement by the pleader calling it "a settlement and portion in life." Brannock v. Hamilton, 9 Bush, 448.

²¹ Miller v. Miller, 4 Bush, 482.

²² Cushing v. Cushing, 7 Bush, 259.

some of which have been heretofore discussed, may be applied to personal property, unless where the nature of such property forbids, or at least renders inconvenient and unlikely a construction that would in the case of land be natural. In fact, the General Statutes (following the first revision) blot out the distinction between "devise" and "bequest,"¹ and thus extend to them all those statutory provisions as to the effect of devises which we have already discussed. The same statute that makes a charge upon devised lands a lien upon them applies also to personalty, for it speaks of "property" that may be devised,² and the same statute also changes as to both alike the common law rules of "ademption."³

A pecuniary legacy is, when nothing else is said in the will, payable one year after the testator's death, and carries interest from that time.⁴ Where the executors are to hold a named sum for the benefit of a named person, they will pay the interest only from the end of such year.⁵

Precatory trusts have been carried very far, though the court said in one case that the doctrine should rather be restricted than enlarged.⁶ A testator devised his whole estate, mainly lands, worth in all about \$15,000 to his brother, whose fortune was about \$200,000. He directed all his lands to be sold. He proceeded: "I devise all the residue, etc., to my brother T., but it is my request of him (but not as a condition, etc.) to . . . raise and educate Lilly B., and that if she is obedient to him and his wife, is governed by their advice, conducts herself, etc., does not marry without their consent, remains with my brother and does not abandon his home, then I request him to expend for her . . . or settle upon her in such way, etc., as he may think her interest requires, . . . \$10,000; *but these requests are not to be legally binding upon*

¹ Gen. Stat., Ch. 21, Sec. 25.

² *Ibid.*, Ch. 50, Art. II, Sec. 3.

³ *Ibid.*, Art. III. (See *supra*, Sec. 64, n. 20.)

⁴ *Ibid.*, Art. II, Sec. 2.

⁵ *Chambers' guardian v. Chambers*, 87 Ky. 144.

⁶ *Major v. Herndon*, 78 Ky. 123.

See *Knefler v. Shreve*, 78 Ky. 297

(Sec. 86, IV), where the wife and children were said not to have an interest in a devise made to the head of a family, on the ground stated in the will that he would need that much to support them comfortably.

him, but I desire . . . to leave the whole matter to his sense of right, etc., he being fully advised of my wishes concerning the said L. B., and concerning said \$10,000 which I request him to use for her benefit if he sees fit to do so, and the condition of his family is such that he can do so without embarrassment." Lilly, the object of the testator's care, complied with all the terms. T.'s family was not in need. He refused to pay, but the court adjudged the legacy of \$10,000 against him, on the ground mainly that otherwise there would have been no use in inserting the lengthy clause in the will.⁷ In a late case the testator, himself a lawyer, took the precaution to say in the will that certain words of "hope" should not raise a precatory trust in one contingency, but should in another, and they were, according to his direction, not enforced.⁸

Evidence as to the condition of the testator and his estate will be oftener invoked in construing bequests of personalty than devises of land. A husband left a large sum to his wife, and left it doubtful whether certain notes were to go to her besides; the residue of the estate he left to his children, and it would have been very little if the notes went to the wife beside the sum named; evidence of the quantity of the estate was admitted in favor of the construction that the notes were to be counted as parts of the sum bequeathed to the wife.⁹

The modern English rule in chancery, according to which those entitled to a future interest in personal estate may have such estate converted into the public funds yielding the lowest interest and affording the highest security, or, in fact, to have it converted in any mode into interest-bearing securities, is utterly unknown in Kentucky practice. But the older rule, which entitles the remainder-man to demand some sort of se-

⁷ *Bohun v. Barrett*, 79 Ky. 378.

⁸ *Enders' ex'r v. Tasco*, 11 Ky. Law Reporter, 592, which follows *Sale v. Thornberry*, 86 Ky. 266, where the following words were held not to raise a precatory trust: "I only make the request of her, and only as a request, for I feel that her own kind heart, etc., will prompt her to do so

without; that in the event she shall marry again she will see that the interests of the children in the property are protected." Held, not a precatory trust, not, however, because the words express no desire, as on account of the uncertainty of the thing requested.

⁹ *Henry v. Henry*, 81 Ky. 342.

curity from the life tenant for the forthcoming of the personality, has been recognized,¹⁰ but has hardly ever been acted upon, except in the case of slaves under a statute made for securing remainder interests. But the life tenant who parts with her estate and possession in good faith is not personally answerable to those in remainder for the subsequent loss of the chattel.¹¹

SEC. 108. GIFTS *INTER VIVOS* AND *MORTIS CAUSA*. The lawful requirements to render gifts valid as against the creditors of or purchasers from the donor belong under the head of Fraudulent Conveyances. The first requisite for making a good gift, as between the parties, is delivery; the next, which is strongly insisted on by the Kentucky courts, is this: that the gift must by its terms be irrevocable. The delivery of a chattel without a valuable consideration therefor, and accompanied by words, written or spoken, reserving to the donor the right to recall the gift, may, if proved according to law, make a good last will; but it is not a valid gift *inter vivos*, and is not enforceable against the donor's representatives. To deliver a chattel to A. with instruction to deliver it to B. in a contingency is not a good delivery.¹ Where money was given to the donee and a note taken therefor, but an instrument given in return reciting the loan and note, and adding, "if I do not collect the note in my lifetime, my executor shall surrender it; it is a gift"—the administrator was allowed to recover the note back after he had surrendered it by mistake.² Where a deed of gift of notes and of farm stock made by a father to four sons was handed by him to a fifth son, with instruction to deliver it to the donees after his death, it was held bad as a gift.³ The affection of a father for even a natural child is a

¹⁰ Yancy v. Holladay, 7 Dana, 230, 235.

¹¹ Bowling's adm'r v. Bowling, 6 B. M. 31.

¹ Duncan's adm'r v. Duncan, 5 Litt. 12.

² Knott's adm'r v. Hogan, 4 Metc. 99, quoting above case; also Walden's adm'r v. Dixon, 5 Mon. 170 (delivery of a mare, reserving the

right to recall, held invalid as a gift), and Brown v. Brown's adm'r, 4 B. M. 538. In the last case the surety on a note had taken it up by payment, as the evidence showed, by way of bounty to the principal debtor; it was held to be discharged, there being a gift of the money.

³ Payne v. Powell, 5 Bush, 248.

circumstance to show that he meant a payment of money on his behalf as a gift.⁴

There can be no delivery without acceptance, hence the knowledge of the recipient is of weight in determining the validity of a gift. Where the holder of a note indorsed upon it words of transfer to the donee, and handed it to a third person with unconditional orders to deliver it to the donee after the giver's death, and informed the donee that he had given her the note, the gift was deemed complete; there was delivery and freedom from reservation.⁵

Gifts *mortis causa* need delivery as much as gifts among the living, as was held in the two first cases quoted above. But where money and securities have already been put into the keeping of the donees, the gift may be completed by a writing showing what has been given and to whom.⁶ In one case the donor had put a note in the possession of, and indorsed it to his lawyer, and a few days before his death had instructed him to deliver it to his wife; it was a very narrow case, but the gift was sustained.⁷

A note, though not payable to bearer, may be "given" *mortis causa*, or otherwise, by delivery without indorsement.⁸ But the deposit in a bank does not pass by delivery of the pass-book.⁹ And the holder of a note upon his child or son-in-law does not release it by merely, upon his death-bed, stating his wish that it be given up.¹⁰

It may be stated in this connection: While an estate in the nature of a defeasible fee may be raised in a chattel by will or deed of trust, yet a simple gift, oral or written, of a *quasi* fee in personalty, gives to the first taker an absolute estate, though made by its terms defeasible upon his dying without issue; and the possibility of reverter can not be executed.¹¹ It

⁴ Brown v. Brown's adm'r, 4 B. M. 538.

⁵ Merriwether v. Morrison, 78 Ky. 572; Betty v. Moore, 1 Dana, 235.

⁶ Kemper v. Kemper's adm'r, 1 Duv. 401.

⁷ Southerland v. Southerland's administrator, 5 Bush, 590.

⁸ Turpin v. Thompson, 2 Metc. 420, approved in following case.

⁹ Ashbrook v. Ryon's adm'r, etc., 2 Bush, 228.

¹⁰ Nelson v. Cartmel's administrator, 6 Dana, 8.

¹¹ Betty v. Moore, *ubi supra*.

was so held in 1833, and we are aware of nothing in the Revised or General Statutes to change the old rule.

SEC. 109. MARITAL RIGHTS. At the time of writing the common law rule, which confers upon the husband at the moment of marriage a right of property in all his wife's chattels personal which she then owns or thereafter acquires, and modified rights in her chattels real and things in action, still prevails in Kentucky. While the husband's receipt for her distributable share, when given, is binding,¹ she is entitled to a "maintenance" or "settlement" out of equities and things in action, for which the husband has to sue in her right, including the price of her land when sold on credit, both for her own benefit and that of her children; and she may herself apply to the Chancellor, and not merely oppose her right of settlement to the suit of her husband or of his assignee.² And the right must prevail, not only against the husband and volunteers, but even against creditors and assignees for a valuable consideration.³

The statute has, however, to some extent abridged the common law rights of the husband. In the first place, there are the methods, already set forth in Section 87, by which the wife may obtain, and the cases in which she has the powers of a *feme sole*. In the next place, if bank or other corporate stock is put in the name of any female "for her use," any husband is excluded from the stock or its dividends, and at her death it goes to her heirs; she may devise it by her husband's consent, and if a trust with proper powers has been raised, without it.⁴ Married women (and minors) may make deposits in incorporated banks, which may be paid out upon their checks and receipts.⁵ And the "wages or compensation of married women for service and labor," by an act of April

¹ Thompson v. Elam, 11 Ky. Law Rep. 455 (1889).

² Moore v. Moore, 14 B. M. 259.

³ *Ibid.*, and Thomas v. Kennedy, 4 B. M. 235; Crooks v. Turpin, 10 B. M. 244 (following, however, in the main the doctrines laid down in Story's Equity). The Kentucky

courts have generally given the whole thing in question, there being no more than would yield even an humble maintenance. (Bowling v. Winslow, 5 B. M. 81.)

⁴ Gen. Stat., Ch. 52, Art. IV, Sec. 15.

⁵ *Ibid.*, Section 16.

11, 1873, are "free from the debts and control of their husbands, and their receipt is a full discharge to the employer."⁶

Of course, a woman may have a separate estate in personalty secured to her either before or during coverture; and where personalty or securities for money are formally given to her by the husband, especially the husband's own obligation, a separate trust is presumed, as otherwise the act would be nugatory; and though such a gift may in many cases be postponed to the claims of creditors, it will be good against distributees or legatees.⁷

Where the wife has a farm as general estate, and her husband, even for a long time, allows her to manage, and to sell the crops, such crops and their proceeds do not thereby become separate estate. The statute limiting the husband's power over his wife's land to a term of three years does not deprive him of the power to collect the rents, though the Chancellor, for good cause shown, might give the wife a settlement out of them.⁸

Except so far as the act of 1873, as to wages of married women, has changed the law, the labor of both husband and wife and its fruits or earnings belong to the former. A case arose before the act, where the wife had a separate estate given to her by her friends; but it was much increased by the "successful business conducted in her name" by herself and her husband. The court placed the work of both on the same footing, saying that the result of the work of either belonged to the husband and went to his assignee in bankruptcy; but said further that the skill and labor of both, bestowed as far as reasonably necessary on her estate, inured to its benefit. There was a reversal in favor of the assignee, with instructions to divide the increase in the estate between him and the wife, without saying upon what principles.⁹

⁶ See B. and F. Gen. Stat., p. 720.

⁷ *Maraman v. Maraman*, 4 Metc. 89, case of the husband's own note; as to gifts from husband to wife, see *Thomas v. Harkness*, 18 Bush, 23; *Campbell v. Galbraith*, 12 Bush, 459,

case of a mortgage on goods given by the husband to the wife for money lent by her to him out of her separate estate.

⁸ *Smith v. Long*, 1 Metc. 488.

⁹ *Shackleford v. Collier*, 6 Bush, 149.

Where husband and wife come from a State in which the latter retains the ownership of her chattels, and they bring them along into their new domicile in Kentucky, her rights of ownership in those movables will be respected, as much so, at least, as if she had a separate estate under our law, both during his lifetime and after his death. The point was, however, decided in a case in which the removal of the parties to Kentucky was procured by the fraud of the husband, and the wife reclaimed her property as soon as she learned of the danger of losing it by the Kentucky law; moreover, the law of the State from which she came (Louisiana) forbids any voluntary arrangement between husband and wife changing the property rights of the latter.¹⁰

The trusteeship which the law throws from necessity upon the husband, as to the separate estate of a married woman, where no other trustee is appointed, ceases with his death, and is not thrown upon his administrator; but when discovered the wife is at once invested with the legal title.¹¹

A decision might be here mentioned to the effect that where money or goods are given to a married woman for the purpose of carrying on a mercantile business, the stock in trade acquired by her under such trust is liable for the debts contracted in such business, and may be sold by the Chancellor for the purpose of meeting such debts.¹²

The insurance act of 1870¹³ makes every insurance policy effected in the name of a married woman, or transferred to her, to inure "to her separate estate and that of her children, independent of her husband or his creditors, or the person effecting the insurance or his creditors." The words giving the children a share seem contrived to secure the uncollected policy from garnishment by her own creditors. However, actions for life insurance taken out for the benefit of the wife

¹⁰ Beard's ex'r v. Basye, 7 B. M. 180.

¹¹ Thomas v. Harkness, 18 Bush, 23, overruling Bridges v. Wood, 4 Dana, 610, where the trust in personalty was said to devolve on the husband's administrator. The reasons

given and authorities cited would extend the rule to real estate.

¹² Goldberg v. Drabelle, 4 Bush, 426, followed in Shackelford v. Collier, 6 Bush, 149, 158.

¹³ March 12; see B. and F. Gen Stat., Appendix, pages 40 and 41.

have, since the statute as well as before, been brought in the widow's name alone, without joining the children.

NOTE.—See also Sections 63, 64, and 87 as to separate estates. Except as indicated above, the Kentucky decisions are in line with those elsewhere.

SEC. 110. REQUISITES OF SALE. The seventeenth section of the English Statute of Frauds, which demands a memorandum in writing as to certain sales of goods and chattels, has never been re-enacted in Kentucky, and sales can be made and unmade by word of mouth and without delivery or re-delivery.¹

The questions arising as to the validity of a sale are generally these: Is there any thing further to be done by either party to complete the transfer? Is the subject of the sale in existence, and is it identified? A late case arose in which the court declined to pass on a nice question of the former kind. The decedent had sold his crop of corn at forty-five cents, to be "shelled, sacked, and delivered in March," and received a part of the price on account, but died when the corn was shucked and in pens, but not yet shelled or sacked. The administrator completed the contract upon payment of the balance, and, the estate turning out insolvent, was sued as for a *devastavit*. But the court acquitted him on the strength of his acting in good faith, rather than because the title to the corn had passed to the purchasers.² But in two older cases³ the sale of a crop was held to pass the title, though the owner was, before delivery, to do certain further work about the crop, and receive so much a pound for the work; and this was considered as of course. The Court of Appeals professes to follow the current of English and American decisions in determining when the sale is complete and the title passes, and when, for want of a proper designation of the thing sold, out of a larger mass, the property remains in the vendor. It was held that a sale, at so much per gallon, of so many barrels of whisky in the vendor's warehouse, identified by their serial numbers, passed the title, though the whisky was to be taken from a

¹ Gant v. Shelton, 3 B. M. 420, 422.
See also Willis v. Willis, 6 Dana, 48;
Buffington v. Wen, 7 Bush, 231.

² Roach v. Ames, 80 Ky. 6.
³ Robbins v. Oldham, 1 Duv. 28;
Cummins v. Griggs, 2 Duv. 87.

country distillery to Louisville, and there to be regauged, until which time the true price could not be ascertained.⁴ Even where the seller of mules was to keep them for a few weeks, and to deliver them only against a note with good surety, it was held that as soon as the bargain was made the title passed.⁵ On the other hand, where the plaintiffs had sold through a broker 1,000 barrels of flour in a warehouse, being all the flour which they had in it, at a price which included the cost of delivery at the bakery of defendants, the flour to be kept at the warehouse during some weeks until called for, and nothing said about terms of payment—neither the defendants nor the broker had looked at the flour to see whether it was all sound and in good order—it was held that the title did not pass, and the flour being destroyed by fire before delivery, the defendants were not made to pay for it.⁶

The necessity of segregation will be discussed hereafter in connection with "Warehouse Receipts."⁷

The doctrine laid down by Parsons on Contracts (I, 151), that the non-existence or absence of part of the goods sold at the time of the contract excuses the purchaser, when discovered, from acceptance *in toto*, is fully recognized.⁸ The Kentucky cases as to title in goods not yet in existence all arise under chattel mortgages, and will be treated under that head. Where the parties evidently mean to buy and sell, though the business be disguised as a renting (as in the sale of a piano on installments), the law treats it as a sale, in favor of a purchaser

⁴ Newcomb-Buchanan Co. v. Cahell, 10 Bush, 460. The whisky was represented by warehouse receipts, but the court says that its decision rests on common law principles, and not on the Warehouse Law.

⁵ Duncan v. Lewis, 1 Duv. 183.

⁶ Brown & Long v. Childs, 2 Duv. 317. And very lately (March 1, 1890) where, in a contract for raft logs, a clause was inserted that in case of death of either party, or other accident, the purchaser should have the right to remove as many logs as

would repay his advances, it was held that nevertheless the title would not pass as long as the seller had to do any thing about the logs to fit them for acceptance; and the buyer was refused possession; whether he had a lien for his advances was left undecided. (Herrman v. Whitescover's adm'r, 11 Ky. L. R. 126.)

⁷ *Infra*, Sec. 120.

⁸ Phelps v. Quinn, 1 Bush, 375. Same principle, where the vendor had lost title to the goods before the sale, Smith v. Gorin, 2 Duv. 167.

from the actual buyer, but pretended renter, especially where under the guise of the rent the bulk of the price has been received.⁹ Where a chattel is sold and delivered, but there is an agreement that "the title shall not pass until the price is paid," such an agreement is good between the parties, but can not be enforced against *bona fide* purchasers from the vendee.¹⁰

As sales are often made by the "hundred weight," the "ton," or the "bushel," the legal definition of these terms must be kept in mind.¹¹

The validity of sales as against creditors and encumbrancers will be treated under the head of Fraudulent Conveyances.

NOTE. As disputes over warehouse receipts arise generally with or between those holding or claiming them as security for debt, we shall treat the Warehouse Law in connection with Encumbrances on Personalty.

SEC. 111. SALES UNDER PROCESS OF LAW. The sale of chattels under a writ of *feri facias*, though regulated by statute, is, unlike the sale of lands, based on the common law. Sales under distress for rent, or under a fee bill, are authorized by statute, and are conducted very much like execution sales. All sales under process of law are made at auction, after such advertisement as is prescribed by law or order of court; if under execution or distress, upon a credit of three months, unless the execution be issued upon a replevy bond, or other bond having the force of a judgment; in judicial sales the court fixes the terms of credit; and though a sale of personalty under an or-

⁹ Green v. Church & Co., 13 Bush, 430.

¹⁰ Vaughn v. Hopson, 10 Bush, 387, overruling Patton v. McCane, 15 B. M. 555, in which the contrary doctrine had been held.

¹¹ A hundred weight is 100 pounds; a ton 2,000. A bushel means the following number of pounds, according to the substance:

Wheat 60; shelled corn 56; corn in the ear 70; rye 56; oats 32; barley 47; Irish potatoes 60; sweet potatoes 55; white beans 60; castor beans 45;

clover seed 60; timothy 45; flax seed 56; hemp seed 44; millet 50; peas 60; bluegrass seed 14; buckwheat 56; dried apples 24; dried peaches 39; onions 57; bottom onion sets 36; salt 50; stone coal (including anthracite, cannel, bituminous, etc.) 76; bran 20; plastering hair 8; turnips 60; unslaked lime 35; corn meal 50; fine salt 55; Hungarian grass seed 50; ground peas 24. A barrel of Irish potatoes is 160 pounds. (G. St., Ch. 112, Secs. 6, 7, 8.)

der of court is reported for confirmation, the purchaser is entitled "to it," *i. e.*, to possession, as soon as he complies with the terms of sale.¹ The title arising by a sale under execution or attachment refers back to the moment when the writ came to the hands of the sheriff or other officer;² and priorities between several writs must be determined accordingly.³ The cases cited below all arose under the Code of 1854, and are rather confusing on the question (which was hardly before the court in any of them) what would happen if the sheriff should for any reason make the first levy upon goods upon an attachment other than the first. But there is no doubt that the court would consider that to be done which ought to have been done, and give the proceeds of sale to the creditor whose attachment had been first put into the sheriff's hands.

As between rival executions, it was held under the execution law of 1828 that the sheriff ought to, and may pay over the proceeds of a sale to the creditor whose execution came to his hands first, though he had first levied and had sold under a younger execution.⁴

Where goods and chattels are in the hands of one officer, under an execution or attachment levy, another officer (which does not mean a deputy, or principal, or fellow-deputy) can not levy on the goods at all, not even subject to the prior levy.⁵ The sheriff of Jefferson and marshal of the Louisville Chancery Court, or the sheriff and coroner, or the sheriff and a constable,

¹ G. St., Ch. 38, Art. X, Sec. 1. C. P., Sec. 696 (credit of not less than three months in order of sale); Louisville Chancery or Law and Equity Court has discretion to order sale for cash or on credit by Sec. 827. See, as to qualification of bondsmen, Sec. 684. As to purchaser having possession at once, see Sec. 698. As to sale of indivisible parcel of personal property by order of court, see Sec. 695.

² G. St., Ch. 38, Art. II, Sec. 1, C. P., Sec. 202; but see next chapter as to attaching choses in action.

³ *Buckner v. Bush*, 1 Duv. 394; *Phelps v. Ratcliffe*, 3 Bush, 334, referring to *Lane v. Robinson*, 18 B. M. 623, 632.

⁴ *Million v. Smith*, 1 B. M. 810, and cases there cited. Two deputies of one sheriff are but one; he must at his peril see to it that the writ against the same debtor, first coming to the hand of either deputy, is first levied.

⁵ *Rogers v. Darnaby*, 4 B. M. 238, where the goods had been replevied. Same doctrine as between State and Federal officers. See *Carryl v. Taylor*, 20 Howard, 583.

or several constables, or the former officer, holding under an older execution, and his successor, may be two officers whose possession of the same chattel is incompatible. And goods under attachment, being in the custody of the court, though they can be levied upon under junior attachments, can not be seized on execution, either by the same officer who levied the attachment, or by any other.⁶

The list of articles which is exempt from levy and sale under the law has been gradually enlarged with the growth of wealth and of humanity, though there has lately been a slight reaction. We give in a note a list of the exemptions now in force.⁷ Work horses and other beasts had to be limited in value in a State in which the breeding of blooded stock is a leading industry and a single horse or cow may be worth a

⁶ Oldham v. Scribner, 3 B. M. 580.

⁷ Two work beasts or one yoke beast and one yoke of oxen; two plows and gear; 1 wagon and set of gear, or cart or dray; 2 axes; 3 hoes; 1 spade; 1 shovel; 2 cows and calves; beds, bedding and furniture sufficient for family use; 1 loom and spinning wheel, and pair of cards; all the spun yarn and manufactured cloth manufactured by the family necessary for family use; carpeting for all family rooms in use; 1 table; all books, not exceeding \$50 in value; 2 saddles and their appendages; 2 bridles; 6 chairs, or so many as shall not exceed \$10, etc.; 1 cradle; all the poultry on hand; 10 head of sheep, not to exceed \$25, etc.; all wearing apparel; sufficient provisions, including breadstuffs and animal food, to sustain the family for one year; if not on hand, other personal property, money or growing crop, not to exceed \$40, etc., for each member of the family; provender suitable for live stock, if there be any such stock, not to exceed \$70, etc.; and if such provender be not on hand, such other

property as shall not exceed such sum in value; all washing apparatus, not to exceed \$50, etc.; all arms, ammunition, and equipments of a militiaman; one sewing machine, and all family portraits and pictures; 1 cooking stove and appendages, and other cooking utensils, not to exceed \$25, etc. (Sec. 1.)

A work beast must not exceed \$150, nor a cow and calf \$60; if on appraisement they are worth more, they must be sold and the limited sum paid over to defendant. (Sec. 2.)

The tools of a mechanic, not exceeding \$100, may be set aside in place of the second work beast. (Sec. 3.)

Libraries of ministers, professional libraries of lawyers, and like libraries and instruments of physicians and surgeons, not exceeding \$500, are exempt; but they are entitled to only one work beast, and to no wagon, cart, or dray. (Sec. 4.)

As to exemption of wages by Section 5, see next chapter. (Act of May 17, 1886; B and F. G. St., p. 571.)

fortune. Growing crops are (unless they be severed by the owner) not to be levied or sold before October 1st ; but this is not, in the full sense of the word, an exemption ; they may before that time be treated as part of the freehold, and if they belong to a tenant are liable to be taken thereafter.⁸

The exemptions are given only to a " person with a family " (formerly a " housekeeper with a family "), a *bona fide* resident of the Commonwealth (Sec. 6 of Act of 1886) ; and the act is applied only to debts created since June 1, 1886, the remedy on older debts being governed by the older law. We have in Section 91 (THE HOMESTEAD) shown what is here meant by a family. While the exemption law favored housekeepers only, it was said : " An avowed intention (of the debtor) to remove, and a packing up for that purpose, did not deprive him of his character of housekeeper . . . any more than an intention to remove would deprive a man of his residence."⁹ This construction would protect the goods of a family leaving the State under the present law, as long as the family itself is within the State lines.

Under the exemption of two work horses, a mare and her colt were allotted to the debtor, although the latter was too young to work, as it did not appear that he was likely ever to be used otherwise than for work.¹⁰

Where the debtor, whose exempted goods have been wrongfully seized, dies, the goods or *their proceeds* do not go to his administrator (for such a course would give them to his creditors and defeat the exemption), but to the widow and infant children.¹¹

Where an execution directed against all the partners, but not for a firm debt, say against some as principals and against the others as the sureties in a replevy bond, is levied upon partnership property, a sale under it will carry the title, and it will be preferred as against a subsequent process for a part-

⁸ G. St., Ch. 38, Art. XIII, Sec. 5.

⁹ Anthony v. Wade, 1 Bush, 110.

¹⁰ Winfrey v. Zimmerman, 8 Bush, 587 (Lindsay, J., dissenting).

¹¹ Myers' adm'r v. Forsythe, 10

Bush, 394. The things exempted from administration (*supra*, Sec. 105) are pretty much the same as those exempted from execution.

nership debt.¹² But under an execution against one of several partners, only his net interest can be reached, not his aliquot share, according to the number of partners, of the chattels levied on.¹³ Much of what has been said about the validity both of the execution and the levy thereof in Section 71, with regard to lands, is just as applicable when a levy or sale is made of chattels. Unreasonable delay would sooner destroy the lien on chattels, unless they were taken into the actual custody of the officer, than on lands. A latent equity or unrecorded mortgage will prevail, if notice be brought home at any time before sale, just as in the case of lands. If we understand the Court of Appeals¹⁴ correctly, personal property levied upon before the defendant's death, though the lien of the execution remains unbroken, can not be sold by the officer after the defendant's death.¹⁵ After a levy is made, the sheriff has a special property, which he does not lose by permitting "the property to remain with the defendant in the execution, or with any other person, on a verbal undertaking to have it forthcoming on the day of sale." He lays himself liable for any loss that may arise, but the lien of the levy is not destroyed.¹⁶

SEC. 112. LIMITATION IN SUITS FOR PERSONALTY. Under the Kentucky doctrine, that the failure of the rightful owner to sue for his chattel during the statutory time, not only bars his remedy, but bars also his right and transfers it to the possessor,¹ the limitation of actions for chattels is properly one of the modes of changing title to personalty, as much as a gift or a sale. "Actions for the taking, detaining, or injuring the personal property, including actions for the

¹² Couchman v. Maupin, 78 Ky. 33.

¹³ Such, f. i., as in Deposit Bank v. Berry, 2 Bush, 236.

¹⁴ Williams v. Herndon, 12 B. M. 484. It might be otherwise if there were collusion on behalf of the execution creditors, and there are fears as to effect of such action by the officer.

¹⁵ Huston v. Duncan, 1 Bush, 205, where it "adds in support of the principle" reasons peculiarly applicable

to land.

¹⁶ Williams v. Smith, 4 Bush, 540; motion on claimant's bond, the court points out that under the Code of Practice of 1854, Sec. 484, equitable defenses can be pleaded to such motions, overruling Watson v. Gabby, 18 B. M. 663.

¹ Stanley v. Earl, 5 Litt. 271 (*supra*, Sec. 99, n. 10); Clark v. Baker, 7 J. J. Mar. 194; Birney v. Richardson, 5 Dana, 424.

specific recovery thereof, . . . shall be commenced within five years next after the cause of action accrued."²

But an "order of delivery" at the beginning of an action can only be had upon an affidavit stating, among other things, that the cause of action has accrued within one year.³

If a chattel mortgage be given for a debt secured by a written instrument, on which suit can be brought for fifteen years after maturity, and the possession of the chattel is left with the defendant, it seems to us that notwithstanding the rule, which in equity makes the mortgage follow the debt which it secures, yet no action can be brought for the sale of the mortgaged chattel after more than five years from the accrual of the right to such action have elapsed. Such has been the decision of learned judges on the circuit, but we can find no reported case on appeal. The right to redeem a chattel mortgage is expressly limited to five years from the time that adverse possession is taken by the mortgagee, leaving it to judicial construction when the mortgagee's possession becomes adverse.

A dictum, according to which a demand and refusal must precede the action against an innocent purchaser of a purloined chattel, and the bar of five years should be counted from such refusal, was soon overruled; and it is also held, that the mere ignorance of the owner as to the whereabouts of his chattel is not within any of the grounds for which the statute (in Article IV of the Chapter on Limitations) extends the time for action.⁴ An administrator can not hold chattels of the estate adversely to the decedent's estate so as to acquire therein a property in his own right, and to prevent their being taken on an execution or order of sale directed against the estate.

Before the General Statutes some nice distinctions were made as to the effect of the death of a party claiming chattels before or after the accrual of the right, and before the completion of the bar; but Sections 3 and 4 of the General Provisions, in the present Chapter of Limitations, put this question as to claims to personal property on the same footing with demands for money.⁵

² G. St., Ch. 71, Art. III, Sec. 2.

³ C. P., Sec. 181.

⁴ G. St., Ch. 71, Art. IV, Sec. 17;

Dragoo v. Cooper, 9 Bush, 629, overruling *Buffington v. Ulen*, 7 Bush, 231.

⁵ *McLaughlin v. Daniel*, 8 Dana, 182.

CHAPTER XVII.

TRANSFER OF CREDITS AND EFFECTS.

SEC. 113. Assignments at Law.

SEC. 114. Other Transfers.

SEC. 115. Transfers by Process of Law.

SEC. 116. Notices Under the Mechanics' Lien Law.

SEC. 117. Corporate Shares.

NOTE.—This chapter treats the law of transfers of choses in action and intangible effects, as far as it differs from the law as to transferring other property.

SECTION 113. ASSIGNMENTS AT LAW. "All bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee, but except in cases of bills of exchange, not to impair the right to any defense, discount or offset, that the defendant has or might have used against the original obligee or any intermediate assignor before notice of the assignment."¹ This section of the present law is re-enacted substantially from an act of 1798.²

It has always been held, that to transfer the title at law there must be a written assignment signed by the assignee or his lawful agent;³ but it need not be written upon the same paper,⁴ nor is any form of words prescribed.⁵ A corporation may assign its bonds, bills, or notes, not only by writing under its seal, but by a resolution on its books,⁶ and a trading corporation of course in any way in which it carries on its other business transactions and authenticates them.

An assignment in blank may be filled up by the holder,

¹ Gen. Stat., Ch. 22, Sec. 6, copied from Revised Statutes.

² M. and B. Stat., I, 150.

³ Gill v. Johnson, 1 Metc. 649.

⁴ Armstrong v. Flora, 5 Mon. 46, referring to former decisions, which

are, however, not found in the reports.

⁵ Frankfort Bank v. Hunter, 3 A. K. Mar. 292.

⁶ Garrison v. Combs, 7 J. J. Mar. 88.

and is then good under the statute;⁷ but where the note has been wrongfully obtained and is not negotiable, a purchaser in good faith from the wrongful holder can not, by filling up the blank indorsement, hold the paper against the true, beneficial owner.⁸

All the unpaid balance of a note can be assigned;⁹ but the transfer of part of what is still owing on a note or bond is not operative at law, nor will two assignments by two obligees in the same instrument, each to a different assignee, carry the legal title.¹⁰ The transfer of negotiable paper does not rest upon the statute, but in Kentucky ordinary promissory notes are not negotiable; the words "like bills of exchange," which are found in the Statute of Anne, having been omitted from the Kentucky act. Judgments and replevy bonds are not within the statute.¹¹ And as the act of 1798 took the place of a broader act of 1796, applicable to "all other writings whatsoever," it was strictly construed as embracing only unilateral obligations, and only those for money and property alone. Bonds for a conveyance, which we have treated heretofore as carrying the equity in lands, when considered as personal obligations, are assignable "at law" when the whole consideration is paid, nothing but the "bond for property" being left, and property embracing land;¹² but when the consideration has not been paid and the bond is mutual, it can not be assigned at law.¹³ Indentures of apprenticeship can not be assigned at all;¹⁴ nor can a covenant

⁷ Owings v. Grimes, 5 Litt. 332.

⁸ Prather v. Weissiger, 10 Bush, 117, 127 (setting aside a *dictum* in Caruth v. Thompson, 16 B. M. 575).

⁹ Bledsoe v. Fisher, 2 Bibb, 471.

¹⁰ Hubbard v. Prather, 1 Bibb, 180; Snelling v. Boyd, 5 Mon. 173. Nor can one of several obligees, not partners, assign the note, bill, or bond. (Sanders v. Blain's adm'rs, 6 J. J. Mar. 44.)

¹¹ Millar v. Fields, 3 A. K: Mar. 107; Anderson v. Bradford, 5 J. J. Mar. 69.

¹² Conn v. Jones, Hard. 8; Ney-

fong v. Wells, *ibid.* 562 (the obligee can not after assignment sue in his own name); Anderson v. Wells, 6 B. M. 542; Vanmeter v. McFaddin, 8 B. M. 438.

¹³ Bowman v. Frowman, 2 Bibb, 233. Does not refer to the two cases in Bibb, and is not mentioned in those in Ben. Monroe.

¹⁴ Schull v. Travis, Pr. Dec. 142. The cases on this head are quite numerous; f. i., the obligations of the hirer of a slave, not only to pay the hire, but also to clothe him and return him, is not within the statute.

to pay money *and* to remove certain houses be assigned at law.¹⁶ Nor are the covenants of the lessee in a lease, there being others beside that for the payment of rent;¹⁶ of course it is otherwise where the reversion is assigned along with the rent and covenants. But a contract to pay a sum in horses, or in corn, or in "good promissory notes," is assignable.¹⁷ The assignee of a note or bond, by written indorsement, has such an absolute title therein that if a creditor of the assignor should without his knowledge recover the assigned debt from the maker of the note by garnishment, and collect it, the assignee may thereafter recover it back from such creditor.¹⁸

Though the assignment of a note is an executed, not an executory contract, such an assignment in a case already quoted was held void, because a part of the consideration was illegal, being money won at gaming, and the title to the note was treated as unaffected.¹⁹ Perhaps it would not have been held thus if the assignor had owned the note in his own right and not as executor of an estate.

NOTE.—The Kentucky law is the same as the general law as to changes in the beneficiary of a life policy by the person who has effected the policy on his life. He can not make a change simply because the insurer is called an assessment company or benevolent order, unless its by-laws or the form of the certificate confer the right on him (*Basye v. Adams*, 81 Ky. 368); and if the new designation is to a party incapable of taking under the charter, the old one will stand (*Ibid.*, and *Robinson v. Duvall*, 79 Ky. 84). Most benevolent orders allow changes by the member (*Schillinger v. Boes*, 85 Ky. 357); and where formalities are required, the society alone can take advantage of the want of observance, not the old beneficiary (*Manning v. A. O. U. Workmen*, 86 Ky. 136). The words "his heirs" in a benefit certificate do not mean the administrator, who would use the fund to pay debts (*Ky. M. L. Ins. Co. v. Miller's adm'r*, 13 Bush, 489), nor legatees, so that the designation might be changed by will (*Weisert v. Muehl*, 81 Ky. 336), but would probably be construed to mean distributees, so as not to exclude the widow.

SEC. 114. OTHER TRANSFERS. The present Code of Practice (Section 19, old 31) allows the assignee of a cause of action to bring suit upon it at law by joining the assignor as either plaintiff or defendant, and if he fails to join him, the

¹⁶ *Marcum v. Hereford*, 8 Dana, 1.

¹⁶ *Helburn v. Mofford*, 7 Bush, 171.

¹⁷ *Sirlott v. Tandy*, 8 Dana, 142.

¹⁸ *Garrott v. Jaffray*, 10 Bush, 413.

¹⁹ *Reed v. Reeves' adm'r*, 13 Bush,

447.

want of parties is waived, unless insisted on by answer or demurrer.¹ Hence the question whether the title at law has been changed under the statute is in most cases not very important, though the legal title purchased for value in good faith from one capable of conveying it ought to prevail against a latent equitable ownership or pledge, while a merely equitable sale of the chose in action would be subject to all older equities, known or unknown.

A sale or gift of an assignable note or bond, not made in writing, gives to the vendee or donee an equitable ownership, and the possession of the paper is *prima facie* evidence that the holder has gotten it as his own from the obligee.²

But all other obligations for money or property, written or unwritten, where the personality of the obligee is not of the essence of the contract, may be assigned in equity by simple agreement between the obligee and purchaser, written or verbal, and whether it be absolute or by way of pledge. Notice to the debtor is needed only to prevent the latter from paying the obligee or acquiring set-offs, but not to transfer the ownership of the demand.³ But an assurance given by the debtor to his surety at the time of the joint engagement that he will give her at any time a transfer of a certain demand, *or secure her in any other way she might suggest*, was held not to amount to an equitable transfer, and would probably not have been such, even without the addition of the general words.⁴

The laws for recording mortgages and deeds of trust, to make them available against creditors and purchasers, embrace personalty; but this means goods and chattels, not choses in

¹ Gill v. Johnson's adm'rs, 1 Met. 649.

² *Ibid.*

³ Newby & Taylor v. Hill & Millim, 2 Metc. 530, quotes a MS. Op. of W. T., 1858, in which the debtor had assented to the transfer, but says that this was immaterial. In Gray v. Briscoe, 6 Bush, 687, this doctrine was acknowledged, but the evidence

of the assignment was deemed too uncertain to prevail against an attaching creditor.

⁴ Elliott v. Harris, 9 Bush, 287. In Corn v. Sims, 3 Metc. 399, a promise of the principal debtor to his sureties to apply the proceeds of a sale yet to be made was held not to give them any equity.

action. A deed of trust is, as to choses in action, neither better nor worse for being recorded.⁵

A check drawn against a bank deposit is held to be "an absolute appropriation of so much money in the hands of the banker to the holder of the check, to remain there until called for, and can not after notice be withdrawn by the drawer." Hence the payee of a check, where the banker has funds enough to pay it, can sue the banker in his own name.⁶ If the check had been larger than the deposit it must have had the same effect of transferring whatever the banker owed to the drawer, and to take precedence from its presentation over other smaller checks.

The payment of a debt by a surety subrogates him to all the "securities" held for it by the creditor, but not to the specialty itself on which the principal debtor and himself were jointly bound. His claim against the principal (unless he takes an assignment at the time) is only for money paid to the principal's use—a very important point, in view of the different times of limitation.⁷ The statute gives a summary method by which the surety, when a joint judgment has been recovered against him and the principal, can have it, upon payment, assigned to him by order of court.⁸ The following section of the statute extends the rights and remedies of sureties to co-obligors paying more than their share, a result which was in 1841 worked out from the equity of an old statute not naming co-obligors.⁹

A transfer by the clerk of a court of all his fees which he might earn in the course of his duties, with power in the assignee to collect such fees, and only allowing to himself and

⁵ Newby, &c., v. Hill, *ubi supra*; Bank U. S. v. Huth, 4 B. M. 448; Forepaugh v. Appold, 17 B. M. 625. In all these cases the transfers were held superior to a subsequent attachment.

⁶ Lester v. Gwin, Jones & Co., 9 Bush, 357. As the deposit is not witnessed by written contract, the assignment is equitable only, and the assignor ought to be a party to the suit.

But the objection for want of parties can only be made by special demurrer, and such was not interposed.

⁷ Joyce v. Joyce's adm'r, 1 Bush, 474, supported by older cases. And so as to co-obligees, Thomas v. Thomas, 2 J. J. Mar. 60, 64.

⁸ Gen. Stat., Ch. 104, Sec. 9. See *supra*, Sec. 68, n. 27, as to necessity of notice of such a motion.

⁹ Morris v. Evans, 2 B. M. 85.

to his deputies a certain monthly sum by way of salary, is unlawful, if not at common law, at least under the Statute of Offices re-enacted as Section 1 of Chapter 81 of the General Statutes, it being, in fact, a sale of the office; and such a transfer can not be enforced, it being in effect a sale and surrender of the office.¹⁰

SEC. 115. TRANSFER BY PROCESS OF LAW. A creditor can subject a chose in action by having the debtor's debtor served with a general attachment, which may be obtained upon the grounds stated in Sections 194, 195, and 237 of the Code of Practice, and a surety has the same right under Section 662, and an attachment may also be obtained in a suit to enforce a judgment after a return of "no property," under Section 441, without an affidavit stating grounds, and without bond. In suits of the latter kind, under Section 439, "persons indebted to the (judgment) defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be made defendants." But while, under the corresponding section of the former Code, the service of a summons, with the object of the action indorsed, upon the secondary defendant, created a lien, no such provision is found in Section 439 of the present Code. It may be doubted whether the principle of *lis pendens* will work out a result which the legislature seems to have deliberately shunned, and whether any thing short of the service of an attachment will now operate as a lien on a chose in action.

As we have heretofore seen, the service of the attachment creates only an equitable lien, but a judgment at the end of the attachment proceedings, or judgment creditor's suit, that the plaintiff recover so much from the garnishee, transfers to the former the legal title to the demand. Such a judgment has the same effect as if the garnishee had paid his original creditor, and protects him against an assignee of the demand against him,¹ unless such demand be a bill of exchange, or note put upon its footing, and negotiated under the law merchant. To obtain such a judgment against a third party, the plaintiff is, in certain cases, authorized to proceed against

¹⁰ Field v. Chipley, 79 Ky. 260.

¹ Coburn v. Currens, 1 Bush, 242.

the garnishee after service of the attachment by "petition or amended petition,"² and thus to bring himself into privity with him.

The time when the attachment comes into the officer's hands does not determine the rank of its lien upon a chose in action belonging to the debtor. But these become bound only by delivering copies of the attachment, and summoning the garnishees. See Code of Practice, Section 203, 3, as to debts or demands, stock in corporations, or property not capable of manual delivery held by any person or corporation for the defendant's benefit, and Section 207, as to a fund in court.

It was held at one time that to perfect the levy of the attachment on a demand, its nature must be specified in a notice appended to or indorsed on the order of attachment;³ but this has since been held to be unnecessary;⁴ and meanwhile an amendatory act was passed,⁵ directing that "no notice need be given . . . describing . . . the debt or demand attached, but only a notice that the person or corporation to whom the order of attachment is delivered is summoned to answer" (giving time and place).⁶

While the salary or fees coming to officers or employes of the State can not be garnisheed, because the State can not be sued, garnishments against the officers and employes of cities and towns have been emphatically sustained.⁷ Of course there can be no garnishment of unearned wages; to allow it would sanction a sort of enslavement for debt.

Choses in action may be sold by a court of equity in a suit for settling the estate of a decedent,⁸ or to wind up a deed of trust for the benefit of creditors, or when "discovered" on a creditor's bill,⁹ or perhaps, also, when an assignment is worked out by law from an attempted preference.¹⁰ The condition for

² Code of Practice, Section 227.

See, as to public policy, end of preceding section.

³ *Menderson v. Specker*, 79 Ky. 509.

⁸ Gen. Stat., Ch. 39, Art. II, Sec. 51.

⁴ *Bell v. Wood*, 86 Ky. 56.

⁹ *Ibid.*, Ch. 58, Art. II.

⁵ Carroll's Code, under Sec. 203.

¹⁰ This might be inferred from the clauses of Ch. 44, Art. II, assimilating the proceedings to those for winding up decedents' estates.

⁶ Carroll's C. P., p. 204.

⁷ *Rodman v. Musselman*, 17 Bush, 855; *Speed v. Brown*, 10 B. M. 109.

such a course is given in one of the quoted parts of the statutes, but is alike applicable to all; it must appear that such choses in action can not be collected within a reasonable time by the use of reasonable diligence.

Some of the Kentucky acts incorporating friendly societies and orders protect the death benefits to be paid by them, not only against the creditors of the member who with his means effected the insurance, but against the creditors of the beneficiaries also.

SEC. 116. NOTICES UNDER THE MECHANICS' LIEN LAW. Having in a former chapter treated of the lien of mechanics and material-men under the statutes, we still have to examine those provisions by which the claim of the contracting builder or other mechanic may be transferred, along with the lien which secures that demand, to those who have worked for or furnished material to him, or for or to a sub-contractor, and between whom and the owner of the lot or structure there is no privity. This is done mainly by a notice in writing, which is in the nature of a garnishment, given to the owner "that a lien will be claimed," and if the owner is at the time "indebted to the contractor or sub-contractor" (it is hard to see what is meant by the owner's indebtedness to a sub-contractor) he must withhold enough to satisfy the claim of the notifying party, or as much as he then does owe, and if he receives more than one notice he must pay the notifiers *pro rata*. The clause denying the mechanics' lien in all cases where security has been taken follows here; but whether it applies to the taking of security by the sub-contractor or material-man from the principal contractor is not very clear.

The additional remedy given to sub-contractors and workmen by the Jefferson County law¹ has been already stated in Section 94. A meaning has been given to the words "joint lien" in this act, in a case in which several workmen, each having a claim against the contractor for less than ten dollars, served their notices on the employer, and the court substituted them for the amount of their demands to the claim and lien of the builder, although their "notices" had been served sepa-

¹ G. S., Ch. 71, Sec. 5; Louisv. City Code, p. 455; Jeff. Co. Act, Sec. 8.

ately at different times, because jointly they had an available claim.²

A question has often arisen between sub-contractors and material-men on the one hand, and the assignees or attaching creditors of the contractor upon the other. The Louisville Chancery Court has held for a number of years that the former, even before they have served their notice upon the owner, have a subsisting equity on the fund in his hands which can not be defeated by any thing short of payment by the owner to the contractor or to his assignee, but not by an attachment. In short, a subsequent lien notice will displace an attachment. The case of an assignment for value is somewhat stronger, but in a case in which the contractor had no written contract to assign, but could only transfer an equity, the Court of Appeals held that the claims of the workingmen must, on reasoning that would have applied just as well to the transfer of a note, be preferred even to those of an assignee for value and in good faith, though the former had not served their notices on the owner until after the assignment.³

SEC. 117. CORPORATE SHARES. Shares in corporations are not, strictly speaking, choses in action, though closely akin to them. All corporate shares, including those of railroads, are personal estate.¹ And such shares are "property" subject to attachment for debt.² The chapter of the General Statutes as to Incorporated Companies directs: "Transfers of stock shall not be valid, except as between the parties thereto, until the same are regularly entered upon the books of the company," etc.³ "The books of the company shall . . . be subject to the inspection of any stockholder," etc. Special acts for incorporating share companies, of which there are many thou-

² Mullikin v. Seiber (misspelt Lieber), 7 Ky. Law Rep. 602.

³ *Ibid.* Oddly enough, the Superior Court in two later cases preferred even an attaching creditor to a sub-contractor who had not served his notice before the attachment.

¹ Act of March 22, 1871, passed to overcome the decision in Copeland v.

Copeland, 7 Bush, 849, and printed *in extenso* under the report of that case. It is not re-enacted in the Gen. Stat.; but as these contain no provisions about railroad shares, the older act stands unrepealed.

² Field v. Montmallin, 3 Bush, 455.

³ Gen. Stat., Ch. 56, Sec. 11.

sands, always, or nearly always, contain a similar clause. Such shares are not within the recording laws, and a mortgage recorded in the county which embraces the principal place of business is no notice to subsequent purchasers.⁴

It was held that at common law the share of a stockholder is transferable like a chattel (which a chose in action is not); that the statute takes the place of a registration law, and, like that, does not interfere with the change of title between the parties; that, moreover, even as a registration law it is only intended for the protection of the corporation itself and of purchasers of stock, but not for the protection of the creditors of a stockholder, and can not be intended to protect them, for the books of the corporation are not to be open to the public at large, but only to the stockholders. Hence, the purchaser of stock for value who held the certificate of the registered shareholder, indorsed by him in the usual way, was preferred to a creditor of the latter, who had levied an attachment upon the stock before the transfer had been entered upon the books of the company.⁵

A bank has, in the absence of charter provisions or of special contract, no lien on the stock held by their debtors.⁶ At present the charter of every bank in Kentucky (of course, excepting national banks) contains a clause granting to it such a lien. But when the bank officers are apprized that a stockholder has sold or otherwise parted with his shares, and has made a symbolic delivery by handing over the stock certificate, the bank can not thereafter, though the stock is not transferred on its books, make further advances on the faith of it.⁷

NOTE.—An attachment is levied on stock in a corporation, under Code of Practice, Section 203, 3, by delivering a copy of the attachment to the same officer or agent on whom, under Section 51, a summons might be served, and summoning him as garnishee, a notice that he is garnisheed being indorsed on the attachment.

⁴ Spalding v. Paine, 81 Ky. 416.

⁶ Fitzhugh v. Bank of Shepherdsville, 3 Mon. 126.

⁵ Thurber v. Crump, 86 Ky. 408.

The courts of the New England States have generally held otherwise.

⁷ Bank of America v. McNeill, 10 Bush, 58.

CHAPTER XVIII.

ENCUMBRANCES ON PERSONALTY.

SEC. 118. Chattel Mortgages.

SEC. 119. Recording Deeds of Personalty.

SEC. 120. Pledges and Some Other Liens.

SEC. 121. Warehouse Receipts.

SEC. 122. Liens by Legal Process.

SEC. 123. The Landlord's Lien.

SECTION 118. CHATTEL MORTGAGES. The last decision treating a chattel mortgage as an executed contract, a sale of goods subject to defeasance, was rendered in 1859. The mortgagee before forfeiture sued at law for possession of the mortgaged chattel, and supplemented his petition thereafter. The mortgagor answered that the debt was fictitious, and the mortgage given by him only to hinder his creditors. The Court of Appeals thought the answer insufficient, as in the suit at law the mortgage is an executed contract, while the defeasance is executory, and can therefore not be set up if tinctured with fraud.¹ Before the case was overruled suits for possession of mortgaged chattels fell into disuse, but the mortgagee's right to take possession after condition broken was affirmed as late as 1868;² it was practically overruled in 1877.³ Indeed, the Code of Practice has, ever since 1854, provided another remedy.^{3a} A conditional sale will be readily construed into a mortgage. An absolute bill of sale can not be turned into a mortgage by parol testimony which would contradict the writing, unless where fraud or oppression is shown, such as is

¹ Brookover v. Hurst, 1 Metc. 665, following Bibb v. Bibb, 17 B. M. 307.

² Brown v. Philips, 3 Bush, 656.

³ Bartlett v. Borden, 13 Bush, 45.

^{3a} Code of Practice, Sec. 249. "In an action to enforce a mortgage or

lien upon personal property," upon certain grounds stated, an attachment may be granted against the property. The section was 273 in the Code of 1854, and in force when the suit in Brookover v. Hurst was brought.

practiced by usurers, or to correct a mistake.⁴ But as the title of chattels passes by parol, the words or conduct of the vendee after the sale must be admissible to show that he considered the vendor as still the owner. This would be only in keeping with the great liberality shown in allowing, on slight grounds, the redemption of property sold under execution or decretal sales.⁵

A mortgage may extend to future accretions of the thing mortgaged,⁶ but not to future acquisitions, such as the goods which the mortgagor may thereafter buy or manufacture in the course of his business.⁷ As to such future acquisitions, the mortgage is good between the parties, but void as to third parties.⁸ But where a railroad company had by its charter been authorized to mortgage its "franchises" in order to raise money, and it did, in pursuance to such authority, mortgage all its property, "present and in future to be acquired," the court sustained it as to cars, wheels, firewood, etc., though not expressing its opinion whether such articles could be reached in the absence of the charter authority, which must have some beneficial object.⁹

SEC. 119. RECORDING DEEDS OF PERSONALTY. There are three statutory provisions for putting a deed of personalty on record. The *first* and best known says: "No deed of trust or mortgage, conveying a legal or equitable title to real or *personal* estate, shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged, etc., and lodged for record."¹

We have shown, as to land, that the mention of creditors is illusory;² also that recording applies neither to choses in action³ nor to corporate shares.⁴

⁴Thompson v. Patton, 5 Litt. 74. In an older case, Blanchard v. Kenton, 4 Bibb, 451, it was intimated that if a bill of sale can be turned into a mortgage, and shown to have been paid, it may be done as well at law as in equity.

⁵See *supra*, Secs. 71, 72, and 88.

⁶Forman v. Proctor, 9 B. M. 124,

126 (issue of cattle).

⁷Ross v. Wilson, 7 Bush, 29.

⁸Loth & Haas v. Carty, 85 Ky. 591.

⁹Phillips v. Winslow, 18 B. M. 431, 446.

¹Gen. Stat., Ch. 24, Sec. 10.

²*Supra*, Sec. 79.

³*Supra*, Sec. 113.

⁴*Supra*, Sec. 117.

An absolute sale and defeasance together constitute a mortgage, and should be recorded; and it was held that where a slave was thus mortgaged, though the mortgagee has possession, he remained subject to execution against the mortgagor.⁵ The case was decided at law.

He who purchases from the owner of chattels in possession need not trace up the vendor's title like a purchaser of land, and has, therefore, no constructive notice of a vendor's lien contained in a recorded bill of sale of the chattels; and it matters not that this bill of sale was included in a deed of land which the same purchaser should have read when buying the land.⁶ It was thought that the recording of a vendor's lien in chattels is unauthorized.

Second. A section of the law on Fraudulent Conveyances directs: "Every voluntary alienation of, or charge upon, personal property, unless the actual possession in good faith accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the County Court for the county where the alienor or person creating the charge resides."⁷ The word "voluntary" seems not to be used here to denote a gift, as distinguished from a sale, but a private sale as distinguished from a sale under execution or order of court. The provision for recording absolute sales of personalty seems to have been wholly overlooked by the business community and the bar. As far as this section bears on change of possession, it properly belongs under the head of Fraudulent Conveyances. In demanding the recording of a charge on property, it coincides with the section quoted from the chapter on Conveyances.

Third. Another section of the present law of Fraudulent Conveyances⁸ that when a loan or pretended loan of personal property is made, and possession has remained with the bor-

⁵ Lobban v. Garnett, 9 Dana, 389.

⁶ Engeln v. Mueller, 12 Bush, 441.

⁷ Gen. Stat., Ch. 44, Art. I, Sec. 8.

⁸ *Ibid.*, Sec. 4, taken from the act of 1796 against Frauds and Perjuries;

see M. and B. Stat., I, 739. Under this law the recording of a bill of sale with a reservation, for instance, the retention of a lien seems proper.

rower for five years, or when any reservation or limitation is claimed to have been contained in an alienation of a chattel so possessed, the absolute right shall be deemed with the possessor in favor of "a purchaser without notice, or any creditor, etc., unless the written evidence of the loan, reservation, or limitation be duly recorded in the county where the person resides, etc., or is contained in a recorded will."

The possession must have lasted five years in Kentucky; the statute does not operate on a possession held elsewhere.⁹ The ownership or reservation is protected if the instrument be recorded at any time before the end of the five years; but to record it thereafter will not avail even against subsequent purchasers.¹⁰ A gift to an infant, of which the father as natural guardian takes possession, does not become by the statute subject to the debts of the latter, or to sale by him.¹¹

All reported cases under the statutes apply to slaves given to a child or grandchild, and the law seems therefore obsolete; but there is no apparent reason why it should not apply to other chattels, whether they be transferred in the family or in the course of trade.

SEC. 120. PLEDGES AND SOME OTHER LIENS. The act of 1820, already mentioned,¹ which annulled any power of sale given in a mortgage or deed of trust, extended to personal as well as to real estate, and so did its re-enactment in the Revised Statutes. We shall see how the Warehouse Law abrogates it as to goods covered by warehouse receipts; and the General Statutes,² while re-enacting the old rule as to land, leave personalty out altogether, thus replacing pledges on their footing as at common law.

When a chattel is delivered to the lender as a pledge, an instrument which accompanies the delivery and states for what sum the chattel shall be held as security is not necessarily a mortgage, and it need not be recorded; and such an in-

⁹ *Fightmaster v. Beasley*, 7 J. J. Mar. 410.

¹⁰ *Ferguson v. White*, 1 A. K. Marshall, 6.

¹¹ *Kenningham v. McLaughlin*, 3

Mon. 30; *Forsyth v. Kreakbaum*, 7 Mon. 97 (saying the two cases are exactly alike).

¹ M. and B. Stat. I.

² Gen. Stat., Ch. 63, Sec. 22.

strument being in writing, evidence that the pledge was also to be held for further advances is inadmissible.³

Generally speaking, the ordinary common law prevails on the subject of pledges in Kentucky. But professional pawnbrokers are regulated by an act of March 6, 1878, and another act of April 22, 1886,⁴ dealing mainly with matters of revenue and police. The first named act, in Section 4, requires every pawnbroker to "keep a register of all loans or purchases of all articles made by him," with names of parties, dates, description of articles, sums loaned, "and the interest charged." This seems to justify a licensed pawnbroker in making conditional purchases and in charging what he chooses for interest. He must give a ticket and receipt for each article. He "shall have the right to sell any article pawned after the expiration of ninety days from the maturity of the loan." But this clause, if loans and purchases are two different methods of dealing, does not restrict his power to treat the "condition of selling back again at a stipulated price" as lost on the very day of maturity. Disputes arising under the act will be generally too small to come before an appellate court.

The ordinary tradesman's lien known to the common law has in a few cases been regulated by Kentucky statutes. Livery stable keepers have by statute a lien on horses and other live stock put in "regular board," as well as those lodged and fed temporarily, and, except as against purchasers for value without notice, this lien is preserved for ten days after the animal is removed.⁵ This lien may be enforced by the sale of work beasts which are otherwise *exempt from sale* for debt, as the statute says that none shall be exempt.⁶ Another act⁷ gives to the licensed keepers of stud horses, jacks, and bulls a lien for the fee on the "get" for the term of one year, not, however, against a purchaser without notice.

³ Harrison v. Wagner, 2 A. K. Mar. 831, followed since in several cases. In fact the change of possession is the best possible notice to all the world.

⁴ B. and F. Gen. Stat., pp. 978, 979.

⁵ Act passed in 1871 for thirteen counties, and in 1874 extended to all

counties except Whitley. See B. and F. Gen. Stat., pp. 879, 880. It gives a summary remedy by warrant and sale.

⁶ Fitch v. Sleayall, 14 Bush, 230.

⁷ February 11, 1876, B. and F. Gen. Stat. 880.

A new water-craft law was enacted in 1880,⁸ the old one having fallen into disuse since the well-known decision of the Supreme Court of the United States, in *The A. D. Hine v. Trevor*.⁹ The new law attempts to provide a lien on "the boat or vessel, her engine, tackle, furnishing, and apparel," with specific attachments for its enforcement, for many kinds of demands that are of maritime jurisdiction, and to that extent the law is invalid, at least as applying to craft that is enrolled in the coasting trade. As well pointed out by the annotators of the General Statutes,¹⁰ the law provides a lien for some classes of demands that are not within the maritime jurisdiction; such are, the cost of building the vessel, and supplies and repairs furnished in a home port, and as to these the State law is enforceable. However, in practice but few cases have occurred within the last ten years where liens upon water-craft were sued for in the State courts, and none are reported.

As to those common law liens which factors, attorneys, bankers, and mechanics have in the goods or documents intrusted to them by their constituents, clients, or customers, no Kentucky decisions can be found striking out a line other than that which is laid down in the English and American text-books. The "general" lien of bankers, for instance, has been expressly recognized along with the exceptions to it.¹¹

A purchaser of a chattel, who, after he has paid the whole or a part of the price, finds reason to rescind the contract, will be allowed a lien on the thing bought, with the right to retain the possession until he is paid.¹²

In a few modern cases where a factor had advanced money for produce, logs, tobacco, etc., with the understanding that it should be shipped to the factor for his reimbursement, the court has declared that an "inchoate lien" exists, which may be perfected by delivery, but which will, until so perfected, not

⁸ February 11, 1876, B. and F. Gen. Stat. 875.

⁹ 4 Wall. 568.

¹⁰ B. and F. Gen. Stat. 875, quoting *Edwards v. Elliott*, 21 Wall. 532. *The Lottawanna*, 21 Wall. 558. *Ex parte, McNeill*, 18 Wall. 286.

¹¹ *Masonic Savings Bank v. Bangs' adm'r*, 84 Ky. 136.

¹² *Scott v. Clarkson's ex'r*, 1 Bibb, 278. Comp. Sec. 92, nn. 24 and 25. In this case the hire of the chattel was set off against the interest on the price.

prevail against any equity, not even against the transfer for equal distribution among the decedent's creditors, which is, under the statute, worked out by his death.¹⁸

SEC. 121. WAREHOUSE RECEIPTS. On the 6th of March, 1869, "An Act in relation to warehousemen and warehouse receipts" was enacted, following in its main provisions similar laws of northern and more commercial States.¹ Its main object was to render goods in the hands of producers and merchants a ready means for raising money by making a receipt, a piece of paper, the representative of the goods; and as nothing in the act restricts the issuing of warehouse receipts to professional warehousemen, or requires the goods for which receipts are given to be kept in a marked room for storage, apart from the receiptor's own goods, the result of the law has been to introduce a dangerous class of secret chattel mortgages. The bulk of the warehouse receipts used in commerce are issued from real warehouses, those for whisky in bond being the most important; next to these the receipts issued from grain elevators, which are regulated by an act of April 28, 1880,² copied substantially from the Illinois law; and these elevator receipts differ from all others in this, that they represent only a named quantity of grain in the bin, not identified, while the general warehouse law contemplates every receipt to be issued for a specified article or other parcel of goods.

The warehouse law of 1869 is not repealed by the General Statutes.³ Stripping it of its verbiage and leaving out the penal provisions, the warehouse act reads as follows:

"SEC. 1. That . . . all . . . persons who shall receive any . . . thing whatever in store . . . shall be deemed . . . warehousemen. •

"SEC. 2. That every warehouseman receiving any thing . . . shall, on demand of the owner thereof, or the person from whom he receives the same, give a receipt . . . setting

¹⁸ Brooks & Waterfeldt v. Staten, 79 Ky. 174; Cook's adm'r v. Brannin, 87 Ky. 101.

¹ B. and F. ed. Gen. Stat., App. p. 112. The fifth section clearly contemplates the issue of receipts by the

owner as collateral for loans, and has been so construed in several of the cases quoted below.

² B. and F. Gen. Stat., p. 1260.

³ See *supra*, Ch. I, Sec. 5.

forth the quality, quantity, kind, and description, . . . and which shall be designated by some mark.

“SEC. 3. All receipts issued by any warehouseman . . . shall be negotiable and transferable by indorsement . . . and with like liability as bills of exchange, . . . and with like remedy thereon.

“SEC. 4. That no warehouseman . . . shall issue any receipt . . . for any goods . . . or other thing . . . to any person, . . . unless such goods . . . or thing shall have been *bona fide* received into possession and store by such warehouseman, and shall be in store and under his . . . control . . . at the time. . . .

“SEC. 5. That no warehouseman . . . shall issue any receipt . . . for any goods . . . or other thing . . . as a security for . . . any indebtedness, unless such goods . . . or other thing shall be at the time . . . the property, without encumbrance, of said warehouseman; and if encumbered by . . . lien, then the character and extent of that lien shall be . . . set forth . . . in the receipt, and shall be actually in store and under the control of said warehouseman, etc.

“SEC. 6. That no warehouseman shall issue any receipt . . . for any goods . . . while any former receipt for any such goods . . . or any part thereof . . . shall be outstanding. . . .

“SEC. 7. That no warehouseman . . . shall sell or encumber, ship, transfer, or remove beyond his . . . control any goods . . . for which a receipt shall have been given, without the written consent of the person holding . . . such receipt, etc.

“SEC. 8 is penal.

“SEC. 9. That . . . when any receipt . . . shall have been issued as provided, etc., and . . . pledged as collateral . . . for the loan of money, the bank or person to whom the same may be pledged . . . shall have power . . . to sell the same . . . in such manner . . . as may be agreed to in writing . . . at the time of making the pledge.”

The rule of the law of sale, that the subject of the sale must be identified and segregated from a greater mass, applies also

to the pledge or encumbrance of chattels, and is not changed by the warehouse law of 1869. It was therefore held that the pledge of "3,600 hams weighing 50,400," by giving a warehouse receipt therefor, while the pledgors had a much larger number of hams in store, and those pledged were in no way identified, did not affect any part of the stock, and conferred no right of property upon the holders of the receipt.⁴ The common law right of the owner of stored goods to sell them, though he have no warehouse receipt, is not taken away by the act.⁵

Where a person, not the owner, even a commission merchant, having power to sell, takes a warehouse receipt in his own name, he can not confer property in the goods by an unlawful transfer or pledge; the clause of the law making warehouse receipts negotiable like bills of exchange does not extend to such a case.⁶ It was held, however, in the same case, that a pledgee of the commission merchant, though he had, in the absence of a "Factor's Act," no property in the goods covered by the receipt, might in a suit by the consignor for "conversion recoup from the value the amount of advances made by the commission merchant to the consignor," especially as the latter was a non-resident. The receipt is, however, negotiable, so as to cut off, in the hands of a holder for value, any defense which the warehouseman might raise against the literal enforcement of the receipt; for instance, he can not against such a holder set up any lien for advances or for storage not specified on its face.⁷ Whether a warehouse receipt lawfully issued to the owner, and indorsed by him in blank, could be held by one innocently buying from a finder or thief against the true owner, as a bill of exchange might be under the same circumstances, has not yet come up for decision. It has been said

⁴ *Ferguson v. Northern Bank*, 14 Bush, 555. On p. 558 a list of States is given in which it was held that manual segregation is not essential to a good delivery by warehouse receipt. On p. 564 the court admits that there is much conflict in American cases, but follows the English

doctrine.

⁵ *Cochran v. Ripy*, 13 Bush, 495, 501.

⁶ *First National Bank v. Boyce*, 78 Ky. 42. *Greenebaum v. Megibben*, 10 Bush, 419.

⁷ *Commonwealth v. Mason*, 82 Ky. 256.

that the indorsers of a statutory warehouse receipt are liable to the holder, like the indorsers of a bill of exchange.⁸

A receipt otherwise complying with the requisitions of the law, but making the goods "deliverable to bearer," is a warehouse receipt within the meaning of the statute.⁹ The prohibition against issuing a receipt for goods which are not at the time in the warehouseman's control does not render it, or the sale or pledge which it is intended to represent, void.¹⁰

SEC. 122. LIENS BY LEGAL PROCESS. Having treated of executions and attachments as leading to the sale of chattels, it remains to speak of a case in which an execution sale raises simply a lien, which can only be enforced by a new suit. This results where personal property is levied upon and sold, which the owner has encumbered before the lien of the execution attaches; the bidder acquires only a lien, bearing interest at the rate of ten per cent; in like manner as by a bid on encumbered land, referred to in a former chapter.¹ And where the property is movable, it will not be delivered to the bidder until he gives bond that it will be preserved for the owner to redeem, and for the encumbrancer's benefit, and shall not be removed from the county.

The enforcement of a *pendente lite* lien against chattels, which are usually bought without any search of records, may work harshly, but is fully established.² In a case, not of a suit for debt, but for ownership and possession, it was held, that where the subjects of such a suit (certain slaves) were removed from Tennessee, during the pendency of a suit there, to Kentucky, and here sold and delivered to a purchaser, such purchaser was bound by the decree subsequently rendered in Tennessee, as much as if it had been pronounced in Kentucky; and this

⁸ Cochran v. Ripy, 13 Bush, 495. *Arguendo* (p. 505). The case has never arisen, and it would be difficult to apply the rules as to dishonor and notice.

⁹ *Ibid.* However, a new receipt was issued in this case after the "warehouseman" had taken control of the goods, and before adverse rights in-

tervened.

¹⁰ Farmer v. Gregory, 78 Ky. 475.

¹ Gen. St., Ch. 88, Art. XIV. See *supra*, Sec. 71.

² The case quoted *supra*, Sec. 96, of a lien created by a creditor's suit on the property named in the petition. Parsons v. Meyberg, 1 Duvall, 206, dealt with a set of furniture.

without reference to actual knowledge of the pendency of the suit in the sister State.³

The lien of an attorney, already mentioned,⁴ rests on personal property or effects of any kind which he has recovered or saved, and is most frequently enforced against money demands. The attorney's name in the record is sufficient notice to the defendant, and prevents him from settling with the plaintiff without laying himself liable to the fee due by the latter to his attorney.⁵ But this is in an action for a certain demand; it is otherwise in a suit for unliquidated damages for a tort, before judgment recovered; and if the parties settle such a case between them, the defendant is not liable to the plaintiff's attorney, even for a fee in proportion to the settlement made.⁶ But it was held, that an attorney employed to sue upon an attachment bond for damages arising from the suing out of a wrongful attachment has a lien on the judgment recovered, which can not be defeated by setting off another judgment by motion; and it is strongly intimated that such judgment could not have been pleaded in the suit upon the bond.⁷

SEC. 123. THE LANDLORD'S LIEN. Aside of the lien which the landlord obtains by his distress warrant, which has the same force as a writ of *feri facias*, or by the attachment for rent, which has the same effect as an ordinary attachment for debt, the statute gives him a lien on the goods found on the premises, which lien he may invoke when the creditors of the tenant have anticipated him in seizing those goods under legal process, and which may have precedence even over mortgages.

After saving liens upon the goods created in favor of others, before the goods came upon the premises, the statute proceeds:¹ "If such liens be created while the property is on the leased premises, and on property on which the landlord has a superior lien for his rent, then to the extent of one year's rent, whether

³ Fletcher v. Torrel, 9 Dana, 376.

⁶ Wood v. Anders, 5 Bush, 601.

⁴ See *supra*, Sec. 95; G. St., Ch. 5, Art. I. Sec. 15.

⁷ Robertson v. Schutt, 9 Bush, 659.

¹ Gen. Stat., Chap. 66, Art. II, Secs.

⁶ Stephens v. Farrar, 4 Bush, 13.

12 and 13.

the same be accrued before or after the creation of the lien, a distress or attachment shall have preference, etc., provided the same is sued out in ninety days from the time the rent was due. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property² of the tenant or under-tenant, owned by him after possession is taken under the lease; but such lien shall not be for more than for one year's rent, due or to become due, nor for any rent which has been due for more than 120 days. But if any such property be removed openly from the leased premises, and "without fraudulent intent, and not returned," the lien is lost unless asserted within fifteen days after removal.

Under Section 15 of the same article, the holder of a lien created after the tenancy has begun may remove the property by paying the rent in arrear, and securing that to become due, not exceeding one year's rent in all; and by Section 16 an officer who seizes a tenant's goods under execution or attachment must in like manner (unless indemnified by the plaintiff under the Code)³ out of the proceeds of a sale pay to the landlord one year's rent due or to become due. But these sections must be read in the light of the preceding restrictions of ninety days, one hundred and twenty days, and six months from the maturity of the rent.⁴

Where the tenant, in the lease, agrees to pay taxes, the amount thereof is part of the rent and covered by the lien.⁵

The landlord does not lose his lien by taking personal security; and he can assign his claim, with the lien to secure it, to the surety in the lease who pays the rent.⁶ When chattels are once put on the rented premises, it matters not that the

²The Rev. Stat. gave the lien only on the produce, fixtures, and furniture. An act of 1858 added the other personal property. It means evidently only such as is acquired by the tenant after he has entered under the lease, and is on the premises. The General Statutes remove some contradictions in the older statutes,

and make the law clearer in favor of the landlord.

³ See *supra*, Section 48.

⁴ *Gedge v. Schoenberger*, 83 Ky. 91.

⁵ *Ibid.*

⁶ *Smith v. Wells' adm'r*, 4 Bush, 92.

term then running has expired, and the lease been renewed once or oftener, the landlord still holds his priority over intermediate mortgages.⁷ Where goods have not only been removed from the premises, but sold in good faith and in the course of trade, the landlord's lien is gone, and is not transferred to the tenant's demand for the price; but such demand may be reached by any attaching creditor of the tenant.⁸

The statutory lien is not to be enlarged by construction or by any equity. Unless the creditor attaches or distrains within ninety days, it is said that the process for his rent will not be preferred to a *lien* by mortgage, nor by deed of trust for the benefit of creditors. "As against all other rights or equities of third parties he must, under the other section, do so within 120 days."⁹ What these rights or equities other than a *lien* might be, is not stated and not easily explained. The difficulty lies more in the useless distinctions of a statute pieced out from older acts, than in the reasoning of the court. However, where within the limit of three months the tenant makes an assignment for the benefit of his creditors, the assignee holds, to the extent of the lien, in trust for the landlord, and the latter need not take any further steps, but may enforce his lien claim in the proceedings in which the assignment is wound up.¹⁰ The lien is only a substitute for the distress, and whatever is exempt from execution (see Section 111) is also free from distress, and the landlord's lien does not attach to it. If the debtor chooses to encumber such property, the encumbrance can not be questioned by the landlord.

A lease sometimes contains a clause extending the landlord's lien to exempted articles. Such a clause can be treated only as a chattel mortgage, and it can not at law apply to things not then *in esse*, such as a crop not yet grown, and will as to such articles not be sustained against the claim of exemption.¹¹

⁷ English v. Duncan, 14 Bush, 877. This seems to be the only point that could arise in this case.

⁸ Stone v. Bohm, 79 Ky. 44.

⁹ Petry v. Randolph, 85 Ky. 352,

355; also Gedge v. Shoenberger, *ubi supra*.

¹⁰ Loth v. Carty, 85 Ky. 591.

¹¹ Vinson v. Hallowell, 10 Bush,

538.

CHAPTER XIX.

FRAUDULENT CONVEYANCES

SEC. 124. Who Can Assail a Fraudulent Conveyance.

SEC. 125. What is Fraud upon Creditors.

SEC. 126. Badges of Fraud.

SEC. 127. Voluntary Conveyances.

SEC. 128. Fraudulent Purchases.

NOTE.—What is said in this and the following chapters of this book applies as well to real as to personal property.

SECTION 124. WHO CAN ASSAIL A FRAUDULENT CONVEYANCE. The first and principal clause of the law against fraudulent conveyances reads as follows:

“Every gift, conveyance, assignment, or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder, or defraud creditors, purchasers, or other persons, and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void as against such creditors, purchasers, or other persons.” (See next section for “proviso.”)

The well-founded rule that fraudulent conveyances are valid between the parties has been followed in a number of cases; noteworthy among them is one decided in 1856, in which the fraudulent grantee was allowed to recover from the grantor in detinue two slaves, who were comprised in a larger sale, which was, in two chancery suits coming up on appeal at the same time, held fraudulent; and while the rest of the property was sold for the benefit of the creditors, the grantee recovered these two slaves, which were apparently not needed for the payment of debts.¹ But this is upon

¹ Bibb v. Baker, 17 B. M. 292. See also Brookover v. Hurst, 1 Metc. 665; *supra*, Sec. 117. But in Williams v. Williams, 18 Bush, 241 (see Sec. 83), the plaintiff was relieved, though he

had evidently allowed his lands to be sold for trifling debts in order to hinder his divorced wife in her pursuit of alimony.

the ground of the executed contract, to which the rule *in pari delicto* does not apply. For a fraudulent grant will not support an executory contract, express or implied. Thus, where the defendant had made a bill of sale of several negroes to the plaintiff with the intent to defraud his creditor, who, however, levied his execution upon them and had them sold by the sheriff, having established fraud in the bill of sale, the plaintiff was not allowed the sum raised on the sheriff's sale as money paid by him for the defendant's use.² But where a deed to the husband of the grantor's granddaughter was set aside at the suit of an antecedent creditor as voluntary, and therefore constructively but not intentionally fraudulent, the grantee's action on the warranty against the devisees of the grandfather was sustained, the kinship of this wife to the grantor making a "good" consideration, and the purchase price named furnishing the measure of damages contemplated by the parties.³ It would have been different in case of intentional fraud.

The necessity of an attachment, or execution, or of a return of no property before commencement of a suit to assail a fraudulent conveyance has been discussed in Section 95.

The present law undertakes to protect creditors, purchasers, and "other persons;" but even under the act of 1796, in which "other persons" were not named, a person entitled to unliquidated damages for a tort was allowed to break a fraudulent conveyance made by the wrong-doer before judgment, or even before suit brought;⁴ *a fortiori* under the present law.⁵

A. being a judgment creditor of B., who was a judgment creditor of C., brought a suit to enforce his judgment against both in accordance with the Code of Practice, and made C.'s wife a party, assailing a deed from him to her as fraudulent.

²Surlott v. Beddow, 3 Mon. 109. Here the bill of sale was without consideration, and there was a secret trust. Suppose plaintiff had actually bought and paid for the negroes, but with the intent of helping defendant to cheat his creditors. The equities would have been different;

but, *quære*, as to the result at law.

³Hanson v. Buckner's devisees, 4 Dana, 251.

⁴Lillard v. McGee, 4 Bibb, 165; Hord's adm'r v. Rust, *ibid.* 231 (both cases of slander.)

⁵Slater v. Sherman, 5 Bush, 206.

The suit was disallowed, there being no privity of debt between A. and C.⁶

Where a subsequent purchaser makes the assault he must, when proof becomes necessary, prove the consideration paid by himself by other proof than the recital in his deed or bill of sale.⁷

Where the owner of timber land makes a fraudulent conveyance, and, retaining possession of the land, cuts timber from it and sells it to an innocent purchaser, the latter can hold it against the fraudulent grantee of the land.⁸

A trustee in a deed for the benefit of the grantor's creditors does not fill the character of either purchaser or creditor, and does not take title to property that before the delivery of the deed to him has been fraudulently disposed of by the debtor; the right to do so remains with the individual creditors.⁹ But it seems that where an executor or administrator under the provisions of the Code of Practice brings his suit to wind up a decedent's estate, in which all creditors, heirs, distributees, devisees, and legatees must be made parties, lands or chattels fraudulently disposed of must be reached in that suit and subjected to the payment of debts; for as soon as it is begun all creditors may be enjoined from suing the estate in their own behalf.¹⁰

Even before the insertion of the words "or other persons" in the law on Fraudulent Conveyances, in the revision of 1852, the courts of Kentucky would set aside a conveyance made in fraud of marital rights, treating the husband or wife for this purpose as purchasers, by the act of marriage, though they

⁶ Jones v. Hill, 9 Bush, 692; but see C. P., Sec. 227 (old Sec. 248), which allows an attaching creditor, after service of the garnishment and failure to get a satisfactory disclosure, by amended petition to treat the garnishee as his debtor for all purposes.

⁷ Edward v. Ballard, 14 B. M. 290.

⁸ Reed v. King, 11 Ky. Law Rep. 615.

⁹ Maiders' adm'r v. Culver, 1 Duv. 164, overruling Gibson v. Moore, 7

B. M. 92, where the trustee, perhaps under the peculiar facts in the case, was treated as a purchaser. Similar decisions in New York and in Michigan led to statutes in those States giving to the assignee the power to recover anything which creditors can reach, to the same extent as the creditors could reach it in the absence of the assignment.

¹⁰ See *infra*, Sec. 130.

are not such within the view of the recording laws. Where a husband shortly before the wedding secretly disposed of his lands, they were in the hands of volunteers, held subject to the wife's dower, and she was allowed to sue for the establishment of her inchoate right even during the husband's lifetime.¹¹ But where a man, on the eve of his second marriage, conveyed to his children, in fulfillment of a promise made by him to his first wife, less than one fourth of his lands, it was held an act of good faith, and the widow's claim to dower in these lands was rejected.¹²

A conveyance made by the bride and kept secret from the intended husband may at his instance be set aside to the extent of his marital rights.¹³ But where the defrauded spouse has notice of the gift or disposition at any time before the wedding, the fraud is purged.¹⁴ Even a secret conveyance can not be set aside if made for an adequate consideration, which will, in the husband's estate, take the place of the thing disposed of.¹⁵ And where a lady while in treaty with one man, with or without his knowledge or consent, "settled" property and then married another who knew nothing of it, he had no right to complain.¹⁶

The right of the wife to alimony or other provisions for herself and child, upon a divorce or separation, is secured by a clause in the divorce law against fraudulent dispositions by the husband,¹⁷ and the remedy has been applied where she sought simply to regain her own chattels which the husband had acquired by marriage.¹⁸ A husband can not, when in near contemplation of death, defeat his wife in her distributive share

¹¹ *Petty v. Petty*, 4 B. M. 217, followed since without reference to the changed language of the law, in *Leach v. Duval*, 8 Bush, 204.

¹² *Fennessey v. Fennessey*, 84 Ky. 519.

¹³ *Black v. Jones*, 1 A. K. Mar. 312; *McAfee v. Ferguson*, 9 B. M. 475, where it is left undecided whether the English exception to the rule of fraud on marital rights, which allows even a secret provision for the wife's

children by a former marriage to stand, is in force in Kentucky.

¹⁴ *Cheshire v. Payne*, 10 B. M. 618, overruling *Hobbs v. Blandford*, 7 Mon. 469, where a notice *very shortly* before marriage had been disregarded.

¹⁵ *Ibid.*

¹⁶ *Wilson v. Daniel*, 13 B. M. 348.

¹⁷ Gen. Statutes, Ch. 53, Art. III, Sec. 12.

¹⁸ *Williams v. Gooch*, 3 Metc. 486.

by purposely giving his personal estate away to his children or to others.¹⁹ In a very late case (1890) the husband, owning an estate of over \$70,000 in value, had, with the knowledge of his intended third wife, before marriage conveyed about \$25,000 in land to his children, reserving during life a right of occupancy. After marriage, having about \$46,000 left, almost entirely in personalty, he gave \$34,000 to his children in "advancements," and soon afterward died, leaving a personal estate of about \$12,000. It was held that the advancements were disproportionate, and evidently made to defraud the widow of her distributive share; that reasonable advancements would have left to the decedent an estate of \$30,000, and the widow was awarded one third of that sum as her distributive share.²⁰

Those whom the fraudulent conveyance would otherwise hinder may treat it as non-existent, without first setting it aside. A purchaser at any execution or decretal sale may recover lands or chattels in ejectment or detinue (or actions of like nature), and a sheriff can defend an action of trespass by the fraudulent grantee as if the grant had never been made; but, as elsewhere, not alone the execution but the judgment behind it must be shown in such a contest. As Kentucky agrees in all this with the rest of the "common law" world, we need not multiply authorities.²¹

A late expression of the Court of Appeals seems to militate against this rule, it being intimated that an attachment grounded on the defendant's fraud can be more effectually levied on property fraudulently conveyed than an attachment taken on the ground of non-residence;²² but it was a *dictum* only; and should the case arise, we do not see how a fraudulent grant could stand against the levy of an attachment any more than against the levy of an execution.

Where an execution purchaser has bought for a trifle prop-

¹⁹ *Manikee's adm'r v. Baird*, 85 Ky. 20.

²⁰ *Murray v. Murray*, 11 Ky. Law Rep. 815.

²¹ *Scott's ex'r v. Scott*, 85 Ky. 386; *Worland v. Outten*, 3 Dana, 477, is a

curious case, where goods fraudulently disposed of were seized under a certificate for witness fees against the grantor, and the seizure was sustained.

²² *Little v. Ragan*, 83 Ky. 321.

erty clouded by a fraudulent conveyance, and appeals to "equity" for assistance, he must do equity, and will have to submit to a resale.²³

In one old case, the fraudulent grantees having disposed of the property received by them before the creditor could reach it, an account was directed against them as trustees by their own wrong of the proceeds of sale; and such a decree, if a guilty knowledge was brought home to the grantees, would probably be sustained at this day.²⁴

We shall hereafter show a state of case in which a conveyance, otherwise void as to creditors, was sustained against a creditor whose demand was fraudulent.

SEC. 125. WHAT IS FRAUD UPON CREDITORS. As neither the common law nor the statute of Fraudulent Conveyances forbids preferences being made among the creditors of one who is indebted and owns property,¹ fraud upon creditors in a conveyance can only consist in this, that some of the debtor's property is withdrawn from the reach of all his creditors, either for his own benefit or for that of volunteers. But the statute condemns not only all attempts to defraud creditors, but even to hinder or delay them; hence a conveyance, though made ostensibly for the benefit of creditors, may be set aside as fraudulent if its natural effect is to delay them; that is, to put off the payment of their demands beyond the time when they might collect them by the ordinary course of law.

On the former head it was said: "A disposition of the debtor's property so he shall still have a benefit therein, but that his creditors can not reach it, is the essence of fraud."² This doctrine was carried out in two old cases in which a deed of trust for the benefit of creditors was held void because it reserved secretly or openly an advantage to the grantor.³ In these cases the property conveyed in trust was

²³ *White v. Cates*, 7 Dana, 357.

²⁴ *Halbert v. Grant*, 4 Mon. 580, 589, Chief Justice Bibb dissenting as to this mode of relief.

¹ The provisions of Ch. 44, Art. II, which deal with preferences, have no bearing on the question of a fraudu-

lent conveyance.

² *Trimble v. Ratcliff*, 13 B. Mon. 511, 514.

³ *White v. Graves*, 7 J. J. Mar. 523; *Byrd v. Bradley*, 2 B. M. 239. While in the former case a secret agreement between the grantor and preferred

subjected to attaching creditors, and those who were provided for in the deed were wholly excluded from sharing in the proceeds. But where the purchaser at an execution sale, by arrangement with the debtor and in trust for him, bid the property in at a low price, the sale was set aside as fraudulent, yet the purchaser was (by a divided court) allowed to retain out of the proceeds of a resale, under the Chancellor's decree, what he had paid to the execution creditors, being substituted to their lien.⁴ In such cases the distinction is made between sales actually and those constructively fraudulent; and if the sale is even actually fraudulent as to the grantor (that is, if his intent in the business was to keep his estate from his creditors), it may still be only constructively fraudulent in the grantee, and in such cases he will be protected to the amount of the consideration paid.⁵

Where a debtor conveys his farm to a son or other kinsman on a credit of five years as to a large part of the purchase money, substituting the lien notes to the land as a fund for the payment of debts, the intent to delay the creditors is apparent, and the sale might on that ground alone be declared fraudulent.⁶ In a more recent case an old farmer sold a part of his lands to a son-in-law, in small part for cash, the residue to be paid in a support to himself and wife for life, thus obtaining the benefit of his property while withdrawing it from his creditors. The sale was set aside in favor of an attaching creditor, but the purchaser was allowed the amount paid in cash out of the proceeds of a resale, there being "no moral turpitude."⁷

This doctrine about the fraud perpetrated by delaying creditors has led to some highly inequitable results. It is said that an insolvent debtor may make a deed of trust, and may seek to prevent a sacrifice of his property thereby, because by preventing it he benefits his creditors; but a solvent

creditor came to light, there was nothing in the latter but the fact of the grantor's retaining possession for three or four months.

⁴ Yoder v. Standiford, 7 Mon. 478.

⁵ Wood v. Goff's curator, 7 Bush, 59.

⁶ Bibb v. Baker's adm'r, 17 B. M. 292.

⁷ Dohoney v. Dohoney, 7 Bush, 217.

debtor is not allowed to do so, because he has no right to make his creditors wait simply to save himself from a sacrifice. Hence an assignment, in which the debtor speaks of his estate as being large enough to pay in full, is fraudulent and void on its face, and on this ground the levy of an attachment upon property conveyed by such an assignment was sustained, and the deed set aside, though it turned out that the estate was far from solvent.⁸

In this and other cases the unfortunate, but under the statute unavoidable test of the grantor's *intention* was applied for testing the validity of the deed, instead of the much more rational test of the *effect* of the deed. It is of vastly more interest to the grantor's creditors when passing upon his conveyance to know whether it really lessens or withholds the fund from which they can draw the satisfaction of their demands, than to know whether the debtor had an honest or a dishonest purpose when he signed the deed.

In two very late cases this notion of inquiring into the grantor's motives was carried still further. In one of them the grantors had committed felonies in contracting some of their debts, and it was shown that they had strong hopes that they would, by making the deed of trust, get a composition with all their creditors and escape prosecution. In both cases the deeds were correct on their face, but one was set aside at the suit of attaching creditors (giving them a preference over the general creditors), because the debtors expressed the hope that by making the assignment they would more easily get a composition from their creditors, and succeed in taking up some highly "irregular" paper; in the other case, because

⁸ German Insurance v. Nunes, 80 Ky. 152, following Ward v. Trotter, 3 Mon. 4. The clause was needless and harmless, and only proved the draftsman's want of skill. But an assignment is not fraudulent on its face because it gives to the trustee the power to compromise with the debtors and creditors of the grantor (White v. Monsarrat, 18 B. M. 814); nor be-

cause it directs the trustee to sell for fair and reasonable prices (Ely v. Hair, 16 B. M. 238); nor because it provides that the trustees may have a salary themselves, and shall employ clerks and pay them out of the trust fund (Vernon v. Morton, 8 Dana, 427). That the grantors have been so employed is not considered in itself a badge of fraud.

the debtor had concealed some goods which he intended to use in bringing about a composition.⁹ In the last case the court seemed to forget that the debtor's fraud consisted, not in assigning those goods which were attached, but in failing to turn over to his assignee the rest of his goods.

It seems that the court treats deeds of assignment that are assailed for fraud with no more favor than it did before 1856, when many of them contained preferences of fictitious creditors, and when the assignee took no oath and gave no bond.¹⁰

The novel case came before the court lately, of a married man while in debt allowing his land to be sold for taxes, and his wife to become the purchaser at the tax sale, paying for it mainly with the rents of her own estate. The purchase was made, of course, for a grossly inadequate price, at which the owner would not have been willing to let any one else buy, and he, being a lawyer, drew up all the needful papers for his wife. The court found nothing fraudulent in this business.¹¹

A debtor often sells land or bulky chattels for a full price and without any reservation, in order to turn into ready money or good paper something which his creditors could more easily reach. The disposition is fraudulent as to him, and would sustain the ground of attachment that he "has fraudulently disposed of his property with the intent to cheat his creditors;" but can the property be taken from a purchaser who has paid his money? In three cases, finally heard in 1847,¹² it was held that mere knowledge in the buyer of the intended fraud is not enough to sustain the seizure of the property;

⁹ *Bank of Commerce v. Payne & Viley*, 86 Ky. 446, Judge Pryor dissenting; *Kleine v. Nie*, etc., 11 Ky. Law Rep. 583, which follows the former as a precedent, and is unanimous. As most assignors try to withhold something from their creditors, hardly any deed of trust for creditors will stand if vigorously attacked. A legislative remedy is much needed.

¹⁰ But not quite as contemptuously as before 1835, when assignees were in the habit of not meddling with the

assigned property at all. The case just named, of *Vernon v. Morton*, is about the first in which a deed of trust for the benefit of creditors is treated respectfully as being the proper way for a failing debtor to deal with his property.

¹¹ *Howard v. Tenny*, 87 Ky. 52, seems to us to be in conflict with *Yoder v. Standiford*. (See above, n. 4.)

¹² *Brown v. Foree*, 7 B. M. 357; *Brown v. Smith*, *ibid.* 361; *Kendall v. Hughes*, *ibid.* 368.

that the buyer can only be deprived of his purchase, if he shared in the guilty intent, of which sharing his knowledge of the vendor's evil intent is only *prima facie* proof. This was under the act of 1796. But the saving clause in the two revisions reads thus: "This section shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."¹³ It was accordingly said, in 1873 and in 1882,¹⁴ that the above decisions are no longer law, and that now, when there is a fraudulent intent on the part of the grantor, and the grantee, though he has given full value, had notice thereof, the property may be taken out of his hands.¹⁴

NOTE.—There can be no fraud as to property which is exempt from process of law. See *supra*, Secs. 91 and 111.

SEC. 126. BADGES OF FRAUD. The commission of a fraud upon creditors consists very often in making a feigned, unreal disposition of property, the debtor retaining the ownership and control with the consent of his grantee. As debtors who wish to cheat their creditors, and their friends who are willing to assist them, are generally willing to tell falsehoods, or at least to withhold the truth, the law has taken hold of certain outward circumstances as "badges of fraud," which are more or less conclusive.

Foremost among the badges of fraud is the retention of movable chattels by the grantor after an absolute gift or sale. Though recording such a transfer may satisfy a section of the statute heretofore quoted,¹ the badge of fraud remains nevertheless. It is the custom of mankind to deliver chattels that are sold or given away, and if one who acts otherwise is found unwilling or unable to pay his debts, it is presumed that he

¹³ Gen. Stat., Ch. 44, Art. I, end of Sec. 1. (Same in Rev. Stat., Ch. 40, Sec. 1.)

¹⁴ *Beadles v. Miller*, 9 Bush, 408; *Summers v. Taylor*, 80 Ky. 429. Here the grantee was the attorney of the fraudulent grantor, defending him in

the suit of the creditor who was to be defrauded. This was deemed sufficient to prove the grantee's knowledge.

¹ Gen. Stat., Ch. 44, Art. I, Sec. 3 (see Sec. 118). See the query as to this in *Foster v. Grigsby*, 1 Bush, 86, 93.

has not really sold or given away those chattels, but is still secretly the owner.

At an early day the Kentucky Court of Appeals followed the lead of the Supreme Court of the United States in a Virginia case,² and held that an absolute bill of sale is void *per se* unless accompanied by possession, and that recording can not aid it, being intended by the statute for mortgages or conditional transfers only.³ And a momentary change of possession, followed by a "lending" of the article by the buyer to the seller, does not avail against a levy made while the seller remains in this possession, which had been broken for a few minutes only.⁴ In this case the vendee had paid a good consideration, about which there could be no doubt; yet it was said that even a real loan would not save the sale from being *conclusively* fraudulent. Such a bill of sale would also be void *per se* against a subsequent purchaser. In 1854 the "doctrine is well established that an absolute bill of sale of personal property, unless it be *followed* and *accompanied* by the possession of the purchaser, is void as to the creditors of the vendee;" and this was announced, not at law, but in passing upon a bill in equity, and that the parties resided together, whereby a visible change of possession became almost impossible, was thought not to help the position of the purchaser.⁵ But soon afterward a distinction was engrafted on the rule, that while "at law" a sale unaccompanied by possession is wholly void, it might, in the absence of actual fraud, stand in equity as a lien for the return of the purchase money.⁶ Here the chattels were

² Hamilton v. Russell, 1 Cranch, 309.

³ Dale v. Arnold, 2 Bibb, 605; Davis v. Grimes, 1 Litt. 242 (the bill of sale is absolute, though it says that possession shall be given upon demand). Hundley v. Webb, 3 J. J. Mar. 648, a bill of sale of slaves, with covenant "to deliver when called for," held fraudulent as against a subsequent mortgagee; the matter is very fully argued, mainly on the older English authorities.

⁴ Goldsbury v. May, 1 Litt. 254, followed by Breckinridge v. Anderson, 3 J. J. Mar. 714, and Laughlin v. Ferguson, 6 Dana, 111, where a contract of hiring and a return of the possession under it to the vendor was held to render the sale void.

⁵ Jarvis v. Davis, 14 B. M. 529, following Walter v. Cralle, 8 B. M. 11.

⁶ Short v. Tinsley, 1 Metc. 397, approved in Whitaker v. Garnett, 3 Bush, 402, and Wood v. Goff's curator, 7 Bush, 59. I do not agree with

farm stock, sold along with the farm itself, the sale of which was recorded, a transaction to be looked at more favorably than a sale of movables by themselves; but a dangerous precedent was set, not only in introducing a new class of secret mortgages, but, what is worse, by showing an easy way for overthrowing a long line of precedents.

And where chattels are sold and delivered, and are at once levied upon by a creditor of the seller, while the purchaser is preparing to remove them, and before a convenient time for that purpose has elapsed, the rule making continued possession fraud in itself can not prevail.⁴ In 1880 the rule was spoken of as harsh, not to be extended beyond the authorities, but to be broken into when slight circumstances distinguish the case, and a sale was sustained against a creditor whose debt was “contracted *after the sale and with actual notice of it.*”⁵ But an absolute transfer of goods, whether by sale or gift, is not aided by recording against either creditors or purchasers; the notice should be actual.⁶

Where the property sold is not capable of manual delivery, the rule does not apply; thus in case of growing crops⁷ or of articles hired out at the time of the sale.⁸

To allow goods levied upon under execution or attachment to remain with the defendant until the day set for the sale is said to be too common an occurrence to be deemed fraudulent, though such a retention, *with a right in the debtor to consume or sell the property*, would be a badge of fraud.⁹ A purchase under execution, decree of court, or distress at public auction “does not come within the reason of the case of *Hamilton v. Russell* (1 Cranch) and the cases decided upon private sales;

Messrs. B. and F. in their criticism on the Court of Appeals for disregarding in the two last named cases the intermediate decision in *Foster v. Grigsby*, 1 Bush, 86. In that case the court refused to allow a deed absolute on its face to stand as a mortgage for the demands and assumptions of the grantee; but refused this after having found the deed to be

fraudulent in fact and intent (*i. e.*, for gross inadequacy of consideration) and not *per se* and in law only.

⁴ *Taylor v. Smith*, 17 B. M. 536, 541.

⁵ *Vanmeter v. Estill*, 78 Ky. 456.

⁶ *Enders v. Williams*, 1 Met. 346, 350.

⁷ *Robbins v. Oldham*, 1 Duv. 28; *Morton v. Ragan*, 5 Bush, 334.

⁸ *Butt v. Caldwell*, 4 Bibb, 458.

⁹ *Swigert v. Thomas*, 7 Dana, 221.

the publicity of the transaction divests it of its tendency to deceive others;" in short, it is not fraudulent *per se*.¹⁰ To mortgage goods does not imply a change of possession; hence the retention of them by the owner is not even a badge of fraud; and an assignment for the benefit of creditors, being in the nature of a mortgage, does not become void by the failure of the assignee to take possession of the goods.¹¹ A mortgage of a stock of goods out of which the owner still goes on making sales, with the evident assent of the mortgagee, is not fraudulent against creditors, though the circumstance is one that might arouse suspicion.¹² And where the mortgagee of chattels agreed afterward to buy them out and out, and accepted a bill of sale, but failed to take possession, he was allowed to fall back on his mortgage as a valid security.¹³

As to other badges of fraud, such as the sweeping character of the conveyance, the ostentatious parading of forms, or that the grantor in case of lands is allowed to receive the profits or a large part of them,¹⁴ etc., it is not supposed that the courts of Kentucky differ from the views expressed elsewhere, from Twine's Case down to our own day.

SEC. 127. VOLUNTARY CONVEYANCES. By statute "every gift, conveyance, assignment, transfer, or charge made by a debtor . . . without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not on that account alone be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."¹

¹⁰ Greathouse v. Brown, 5 Mon. 282.

¹¹ Lyons v. Field, 17 B. M. 548 (but see Kleine v. Nie in preceding section); and long delay of assignee and want of active interest in the assigned property, is a badge of fraud (Byrd v. Bradley, 2 B. M. 239); as to ordinary mortgages, the position is too well known to need citations.

¹² Ross v. Wilson, 7 Bush, 29, 36.

The mortgage in that case was sustained.

¹³ Daniel v. Morrison's ex'r, 6 Dana 182.

¹⁴ Trimble v. Ratcliff, 9 B. M. 511, 513. And see Foster v. Grigsby, 1 Bush, 86, as to inadequacy of consideration, lumping bargains, and blood relation between grantor and grantee.

¹ R. St., Ch. 40, Sec. 2. G. St., Ch. 44, Art. I, Sec. 2.

It will be noticed that these gifts, etc., may be void without being fraudulent. A gift may be set aside under execution, or by creditor's bill after a return of no property, though the making of the gift would not have sustained the ground of attachment that the debtor had disposed of his property with the fraudulent intent to hinder his creditors. That the donee is a child of the donor, and that this remaining property is amply sufficient to satisfy all his debts, is wholly immaterial.³ The English rule, which sets aside a voluntary conveyance even in favor of a purchaser with notice—a rule which only aids fraud, as it enables a grantor at will to resume what he has given—is wisely repealed by this statute. But the notice given of a voluntary deed by the record is not sufficient to affect a subsequent purchaser even as to land, although the donees be the donor's children, and the deed is supported by a good, if not a valuable, consideration.³

The question whether a deed is voluntary often depends on the truth of its recitals. A deed, as against those not parties or privies, proves only its own execution, but not that the consideration therein named was actually paid. But there seems to be this distinction: Where no fraud has been shown on the part of the grantor, it will be assumed that the consideration recited in the deed was paid; but when the fraudulent intent of the grantor has been established, the burden of proof is shifted, and the grantee must show that he has paid value.⁴

³This was declared to be the law, on the authority of Ch. Kent, in *Read v. Livingston*, in 3 John. Chy. Rep. 500, in *Hanson v. Buckner's devisees*, 4 Dana, 251. The contrary was said *arguendo* in *Trimble v. Ratcliff*, 9 B. M. 511, 514, in 1849. Messrs. Bullitt and Feland have pointed out in their notes to the Gen. Stat. (Ch. 44, Art. I, Sec. 2), that in two cases coming up since the Rev. Stat. the doctrine of Ch. Kent of fraud *per se* was disapproved. (*Enders v. Williams*, 1 Met. 34, and *Young v. Duhme*, 3 Bush, 343, 349.) But the facts in the former case arose before

1852, and in neither case did a prior creditor attack a conveyance. We must therefore assume that the Court of Appeals did not intend to argue away a positive statute, but only to discuss the law before and aside of it.

³*Enders v. Williams*, *ubi supra*; *Winter v. Mannen*, 81 Ky. 123; where a petition by the children claiming under a voluntary deed against the subsequent purchaser for money was held bad on demurrer for not alleging notice.

⁴*Garnett v. Whittaker*, 3 Bush, 402, 413.

The latter point is decided; the former only intimated. Often the dispute arises over deeds between husband and wife, where the former professes to be under obligations to the latter to restore to her her own property or its value, the deed being made after the husband has incurred a debt, and not for a present consideration. The last case under this head is typical of the class. The wife owned valuable lands, by inheritance or devise. Her husband desired to sell them; the wife objected till the husband agreed that if she would consent he would invest the proceeds, as far as he should buy lands, in her name, and would also convey to her certain other lands. She consented, and her lands were sold; but he neglected to make the proper deeds for many years (she never abandoning her claim), until after the creation of the assailing creditor's demand. The deed was sustained.⁵ In another case the wife's inherited estate has by the husband been invested in land in his own name; she discovers it, and when it is sold insists that the next investment shall be in her name; but it is again placed in his name without her knowledge; this land being also sold, the proceeds are placed in trust to her separate use; but meanwhile a debt has been created. Her equity was held to justify the last arrangement.⁶ The element of fraud perpetrated on her, by taking conveyances in his own name, was much dwelt upon in this the earlier case, but is absent in the first quoted later case. There may, however, be such an assent by the wife to the husband's appropriation of estate coming through her as to make it his for all purposes, so that she would no longer be entitled to "a settlement," and that any subsequent transfer to her might be voluntary and void as against creditors.⁷

⁵ Doty v. Louisville Banking Co., 10 Ky. L. R. 898 (1889). It is to be regretted that the opinion of the court lays great stress upon the husband's being liable as surety only, and on the creditor's being an assignee of the note.

⁶ Edwards v. Miller, 7 Bush, 394 (1870). In Campbell v. Campbell, 79 Ky. 395, it was said that a cred-

itor who was not misled can not object to a husband performing his pre-nuptial contract, by which he agrees to convey to his wife the lands bought with the distributive share in her father's estate and proceeds of inherited lands, which he had first taken in his own name.

⁷ Darnaby v. Darnaby's assignee, 14 Bush, 485, relying on Pryor v.

The voluntary grantee can not defend a suit to take the thing granted from him, by showing that the return of "no property" is untrue, the grantor really having enough other property to satisfy the execution, nor can he save himself by showing a combination between the grantor and the attacking creditors to deprive him of an executed gift.⁸

This decision is not only harsh, but in conflict with an older case, where voluntary conveyances were made by an old man to a son-in-law, which another son-in-law attempted to set aside in favor of a judgment upon a bond which he had recovered against the grantor. The grantee was allowed to show in his defense that the bond itself was fraudulent and the judgment obtained by collusion. The court said further that it ought not to be in the power of the grantor by indirect means to overreach and do away the effect of those deeds, which are binding upon him, and which by no direct means could be avoided by him.⁹

That a deed or transfer is voluntary will not by itself avoid it as against subsequent creditors or purchasers with notice, and a gift may in the same judgment be sustained against these while it is subordinated to antecedent demands. The rank of a debt depends, under the law on this head, as under the homestead law, on the time of its first creation, and is unaffected by the change or renewal of securities, or by the subrogation of the surety.¹⁰

The attempt to ascribe a consideration to a deed, which in fact was made without one, is a badge of intentional fraud.¹¹ Where the donor, by the gift (even a gift to his children) strips himself of the means to pay what he owes at the time,

Smith, 4 Bush, 379; but in these cases the husband had not conveyed to the wife and made a general assignment.

⁸ Yankey v. Sweeney, etc., 85 Ky. 55; but see Sec. 124, n. 3, for right of voluntary grantee to sue in warranty.

⁹ Faris v. Durham, 5 Mon. 397, 400.

¹⁰ Lowry v. Fisher, 2 Bush, 70 (see also as to torts, Sec. 124, nn. 4 and 5).

The case is distinguished from that of a stockholder of a corporation whose charter makes those liable for debt who hold stock when the debt is contracted; for then the creditor by a renewal gives a credit to the stockholders then on the list. (Castleman v. Holmes, 4 J. J. Mar. 3.)

¹¹ Little v. Ragan, 83 Ky. 321.

there is proof of a bad intent, which may render the transfer fraudulent and void as to later as well as earlier creditors, and as to purchasers with or without notice.¹² In such a case the priority between the two classes of creditors will only depend on the date of their executions or attachments.

SEC. 128. FRAUDULENT PURCHASES. Before the Revised Statutes of 1852, the power of the court to subject to the payment of a person's debts property never owned by him, but bought with his means in the name and for the ostensible benefit of another, was involved in some doubt and difficulty.¹ But the matter was set at rest in 1852 by two sections of the chapter on Lands; the first does away with resulting trusts, in case of a deed made to one person where the consideration is paid by another, while the next provides, "Such deeds shall be deemed fraudulent as against the existing debts and liabilities of the person paying the consideration."² It seems that, taking the two sections together, property so bought by the debtor in another's name can never be reached by subsequent creditors.³ Also, that the rule applies as well to chattels,

¹² Lowry v. Fisher, *ubi supra*, quoting Doyle v. Sleeper, 1 Dana, 533, and Lyne v. Bank of Kentucky, 5 J. J. Mar. 554. In the last case it was also said: "If a man settles on his family all his estate, intending to venture on a large speculation on credit, attended with hazard, by which he will either make a large fortune or lose one, with a view, if he should fail, to preserve what he owns from creditors, and keep such an arrangement a secret until his ruin is accomplished, we should pronounce such a conveyance a fraud on creditors of the blackest character" (p. 554).

¹ Crozier v. Young, 3 Mon. 157, against the right of the creditor; Doyle v. Sleeper, 1 Dana, 531, in favor of it, Judge Nicholas dissenting, while the majority of the court worked out a resulting trust for the creditors.

² Rev. Stat., Ch. 80, Secs. 21 and 22; G. St., Ch. 63, Art. I, Secs. 19 and 20. The following sections, resp. 28 and 21, subject all trust estates to the "debts and charges" of the *cestui que trust*. We have already considered it *supra*, Sec. 86, IV. It is enlarged from Sec. 13 of an act of 1796 (see *supra*, Sec. 59), which seems to have reached only the beneficiary estate held under a naked trust. In case of such a trust it was held that an execution sale would carry the legal title, and this rule was held in force under the present statute in Anderson v. Briscoe, 12 Bush, 344.

³ See Secs. 90, 124, and 127 as to who is an antecedent creditor. Though a suit may have to be founded on a new promise, taking the debt out of the Statute of Limitations, yet the old rank will be retained.

stock, or other effects as to real estate. But few cases have come up under this law. The first that is reported since the adoption of the Revised Statutes is said to have been decided by a misunderstanding, three of the four judges being opposed to the decision. A stranger had sold to the debtor two tracts of land in exchange for a slave, and had conveyed the land to the wife and children of the debtor, but not until after he had complained of the debtor's want of title in the slave, and had in a suit for specific performance been compelled to carry out the trade. It turned out though that he never obtained possession of the slave, and the opinion of the court (J. Robertson) would not subject the land to an old judgment against the husband and father, treating it as in effect a free gift from the stranger, who had gotten nothing valuable in return.⁴

The most frequent purchases with one person's means in the name of another are those made by the husband in the name of the wife. As lands in Kentucky are nearly always bought on terms, more than half of the purchase price being secured by the note of the buyer and a vendor's lien, it will often happen that the husband, buying a house and lot or a farm in his wife's name, while solvent, or at least while not owing any debt which he does not afterward pay, will contract debts afterward, but before he has discharged the liens on the purchased lands. But being in form a joint maker, in law the sole maker of the notes given on the purchase, he pays his own debt while discharging his wife's land from a lien. In 1871 the Court of Appeals decided that the husband had the right to thus pay the lien notes, applying the means which otherwise would have gone to his unsecured creditors, and thereby increasing the value of his wife's property.⁵

For some reason the Court of Appeals did not refer, either

⁴ Hanby v. Logan, 1 Duv. 242.

⁵ Place v. Rehm, 7 Bush, 585, reversing the Louisville Chancery Court. In 1856, in an exactly similar case from the same court, not re-

ported, the Court of Appeals had directed three fifths of the wife's land to be sold, because three fifths of the price were paid after the debts had accrued.

in the two last named cases, nor in another subsequent case,⁶ to that clause of the two revisions (*supra*, n. 2) which declares a purchase with A.'s means in B.'s name fraudulent as to A.'s existing creditors, but discusses the matter on principle and on the two old cases (*supra*, n. 1). In 1882, at last, the court gave its judgment subjecting lands bought by the husband in the wife's name to his debt, and rested it, in part at least, on this statute.⁷

Land purchased by one with his own means in the name of another can not be subjected to subsequent creditors, even in cases in which actual fraud was intended against antecedent creditors; there is no statute under which such a result could be worked out, and it was declared in the leading case (n. 1) of *Doyle v. Sleeper* that the common law does not in any case extend its care to subsequent creditors.

It being contended (and soon afterward decided)⁸ that a man in debt could not insure his life for the benefit of his wife to a heavy amount without subjecting the policy to the claims of his antecedent creditors (though he might set apart a moderate sum), the legislature in 1870 came to the aid of the policy holder or beneficiary, without regard to the relationship with the "life," and whether the policy be assigned to him or her, or originally taken in his or her name; but in either case, "if the premium is paid by any person with intent to defraud his creditors . . . the premiums so paid, with interest thereon, shall enure to their benefit."⁹ The act was held to apply to insurance already effected, and an annual payment of \$125 a year for the benefit of the wife was held not fraudulent, even against antecedent creditors.¹⁰ In order to subject the insurance money, the creditor must show "intentional fraud."¹¹

⁶ *Marshall v. Marshall*, 2 Bush, 421. The court relies greatly on *Crosier v. Young* (*supra* n. 1), but decides in favor of the debtor's wife mainly upon the ground that the property was paid for with her own earnings.

⁷ *Adams' ex'x v. O'rear*, 80 Ky. 129.

⁸ *Stokes v. Coffey*, 8 Bush, 533.

⁹ Act of March 12, 1870, Secs. 31, 32, B. and F. G. St., Appendix in ed. of 1888, p. 42.

¹⁰ *Thompson v. Cundiff*, 11 Bush, 567.

¹¹ *Hise v. Hartford Life Insurance Co.*, 11 Ky. L. R. 924.

In the legislative charters of several benevolent orders and amicable societies, which are restricted in the amount which they can insure, the policy is secured to the beneficiary against the creditors of the member without giving them even the right to attach an amount equal to the premiums paid.

NOTE.—There is a class of “fraudulent purchases” wholly disconnected from the subject of this section; that is, the buying of goods on credit without the intention of paying for them. The right of the seller to reclaim such goods was recognized by the attachment act of 1888 (Loughb. p. 116), and by the Codes of Practice (Sec. 274 of '54, 250 of '76), which acts are supposed not to exclude the common law remedy. But the seller can not pursue the goods when they have passed into the hands of a *bona fide* purchaser from the fraudulent buyer: *Gibson v. Moore*, 7 B. M. 92 (the purchaser in this case would perhaps not be deemed such now); *Vaughn v. Thompson*, 10 Bush, 887, 842.

NOTE.—The limitation or bar of time on fraudulent conveyances has been discussed *supra*, in Sec. 99, n. 9.

CHAPTER XX.

DISTRIBUTION AMONG CREDITORS.

SEC. 129. Assignments for the Benefit of Creditors.

SEC. 130. Estates of Decedents.

SEC. 131. The Law against Preferences.

SEC. 132. Individual and Partnership Debts.

SEC. 133. Subrogation.

SEC. 134. Charges and Contribution.

SECTION 129. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. A trader (trading firm, or corporation) that finds himself unable to pay his debts, in most cases in Kentucky, makes an "assignment," or deed of trust, for the benefit of his creditors. He can choose his own assignee, and often chooses one of the "Trust Companies" that have lately been incorporated with the power of exercising fiduciary duties. Under a statute already alluded to, and to be treated fully hereafter, he can not discriminate among his creditors without incurring the risk of having his deed converted into an "assignment by operation of law." Hence, ever since 1856, Kentucky assignments provide equally for all unsecured creditors. The deed must, under the statute, be acknowledged and lodged for record in the clerk's office of the County Court, and the trustee must accept the trust, and before the County Judge qualify by taking oath and giving bond in like manner as an administrator.¹

While this act makes it unlawful for the trustee to act before he has given bond and taken the oath, yet his omission to do so could not in itself defeat the trust, though it might count.

¹ Act of March 8, 1876, printed as Ch. 109^a in B. and F. G. St., p. 1251. Sec. 1. prescribes the oath and bond; Sec. 2 gives a remedy on the bond to any person injured; Sec. 3 requires the filing of an inventory within 60

days, and a report of sales within two years; Sec. 4 allows to the county clerk the same fees as in the matter of decedent's estates. The recording of the deed is required in the first section by implication.

as one of the badges of fraud in avoiding the deed, which under recent decisions is so easily done.² We have seen also that the assignee for the benefit of the creditors is not deemed either a representative of the creditors or a purchaser within the meaning of the Statute on Fraudulent Conveyances;³ and on the same ground he can not override secret equities. In an older case it appeared that an assignment had been made in pursuance of an arrangement between the debtor and a number of creditors, who agreed to forego taking certain steps, in consideration of his promptly executing the deed to a trustee of their own choice, and he was protected as a purchaser against latent equities of other creditors.⁴ Perhaps under such circumstances the assignee ought still to rank as a purchaser.

The first and foremost thing to construe in a deed of trust is the list of assets: Is it to include every thing not exempt, or is it restricted to a schedule? In an old case such a general clause as "all the estate, real, personal, and mixed, to which they are entitled, in law or equity, severally or in common," was held to be limited by the words following it, "the situation . . . quality, amount . . . of which is . . . fully explained in a schedule," and an item not found in the schedule was not allowed to pass under the deed.⁵ But where the schedule was followed by the words, "and all other property not exempt from execution, which by oversight may have been omitted," interests held in trust were adjudged to pass which the assignor did not wish to assign and which he firmly believed were not subject to the demands against him.⁶ A claim of the assignor to an easement, and to damages for intrusion

² *Bank of Commerce v. Payne*, 80 Ky. 446, and see *supra*, Sec. 125, n. 8 and 9.

³ *Zaring v. Cox*, 78 Ky. 527.

⁴ *Gibson v. Moore*, 7 B. M. 92. (Generally thought to be overruled). In *Hildeburn v. Brown*, 17 B. M. 779, a mortgage purposely withheld from record that it might be used only at the debtor's own option, whenever he should find himself

compelled to go into insolvency, was held ineffectual as against the assignee and the beneficiaries under the deed. Perhaps this case, too, is overruled by *Maiders v. Culver*, and the line of cases following it, which are clinched by *Bridgeford v. Bowles*, 80 Ky. 529, 535.

⁵ *Scott v. Coleman*, 5 Litt. 349, 353.

⁶ *Knefler v. Shreve*, 78 Ky. 297.

upon it, passed under a mere "etc." at the end of an enumeration.⁷

The time of two years, which the assignee has under the statute to file his report of sales in the County Court, is not understood as excusing him from reporting and distributing the proceeds sooner, should he have gotten them at an earlier day; nor to excuse a delay in selling property, which the interest of all concerned requires sooner to be sold. Mercantile assignments are almost always wound up in a much shorter time.

The measure of dividends to be paid to a creditor, who before the assignment had obtained a lien securing his claim in part, came up in 1858 under a deed made when preferences were allowed and neither oath nor bond required. Such deeds had nothing official or public about them, and the court saw no reason to compare a distribution under such a deed with one made in bankrupt proceedings. The deed of trust was simply one of two or more mortgages, and the rule was applied which allows the holder of several securities to get as much as he can under each till his whole debt is paid; and a decree allowing the appellants to "prove" only the balance after exhausting their security was reversed.⁸ The rule is supposed not to apply where the lien preceding the deed of trust arises by operation of law (execution or attachment), and not by contract.⁹

The law for the settlement of decedent's estates and of estates wound up under the act against preferences gives a priority to certain fiduciary debts. An ordinary deed of trust for the equal benefit of the grantor's creditors is not construed with any reference to this law, and these fiduciary debts go under it *pari passu* with all others.¹⁰

⁷ Mayo v. Sneed, *Ibid.* 634.

⁸ Logan v. Anderson, 18 B. M. 114. Appellants were creditors of a firm which assigned on the 31st, but had been partially secured on the 23d by one partner assigning his individual property, and on the 30th by receiving from the firm certain drafts as collateral. Had these drafts been paid at once, it is admitted that ap-

pellants could have gotten a dividend only on the balance of their demand.

⁹ So intimated in Bangs' adm'r v. First National Bank, 84 Ky. 85.

¹⁰ Grimes' assignee v. Grimes, 86 Ky. 511. See last words on p. 516; also Hampton v. Morris, 2 Met. 336. Thus the debtor has the choice to prefer or not to prefer a certain class of creditors; see *infra*, Sec. 131.

The Code of Practice (Section 438) requires the same verification of claims in suits to wind up an assignment as in the settlement of decedent's estates. (See next section.)

SEC. 130. ESTATES OF DECEDENTS. Ever since 1839 it has been the policy of Kentucky not to allow any priorities in the distribution of a decedent's estate. Sections 428 to 437 inclusive of the Code of Practice stand in the place of the act passed in that year. Either the personal representative, or any one or more creditors, heirs, distributees, devisees, or legatees may apply for a settlement in the Court of Equity of the county in which the will was probated or administration granted; and if the suit is begun within three years after the representative has been qualified, all creditors may as of course be enjoined from suing the estate.

The administrator or executor can not "retain" so as to give himself a preference over other creditors, though he may, subject to the right of those creditors to prorate with him, "retain" for a demand, on which under the Statute of Frauds no action can be brought.¹ Specialties stand no higher than debts by parol, and a suit for settlement cuts off all priorities which might be obtained by executions against lands descended, or *de bonis testatoris*.² "Burial expenses and the costs and charges of administration . . . and the amount of estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court . . . to and remaining in the hands of a decedent, shall be paid in full before, etc.; but this preference shall not extend to a demand foreign to this State."³ Though the statute directs these priorities "in case the personal estate is insufficient," they are applied also to the proceeds of land, on the ground that lands in Kentucky are legal assets, and equity must herein follow the law.⁴ The rule for distribution is, as to creditors holding partial securities,

¹ Berry v. Graddy, 1 Met. 555.

² G. St., Ch. 39, Art. II, Sec. 33. *Ibid.*, Ch. 44, Art. I, Sec. 10. C. P., Secs. 428, 436.

³ G. St., Ch. 139, Art. II, Sec. 33. *Qu.* Do these fiduciary debts rank *after*, or do they rank *with*, burial expenses

and costs of administration? The literal words of the statute indicate the latter construction; practice follows the former.

⁴ Muldoon v. Crawford's adm'r, 14 Bush, 125.

the opposite from that which prevails under voluntary assignments.⁵

“When such estate is covered by liens giving a creditor a priority on such property, the proceeds thereof shall be first applied, etc.; but when any creditor has a lien, and the property subject to the lien is not sufficient to discharge the debt, he shall not be entitled to any portion of the residue of the estate until all the creditors not having liens shall have received a sum equal *pro rata* with such lien creditor.” This section was construed in a case where factors upon the faith of shipments accepted the drafts of their consignor, who died before the drafts matured; they paid them, and the shipments fell short of covering the drafts; it was held, that by relation back they are to be deemed creditors of the decedent, and can not claim a dividend until the other creditors have received as large a proportion on their debts as they did.⁶

The General Statutes require every demand against a personal representative to be verified in a given form;⁷ and the Code of Practice (Section 437) requires every claim, secured or unsecured, in a settlement suit to be supported by an affidavit to the same effect.⁸ This verification does not apply to claims arising after the death of testator or intestate for burial expenses or costs and charges of the trust.⁹ Although the Code of Practice does not bar creditors who fail to appear in a settlement suit from their remedy against the heirs, devisees, or

⁵ G. St., Ch. 39, Art. II, Sec. 34.

⁶ Martin, Cobb & Co. v. Curd's adm'r, 1 Bush, 327. In this case subrogation by a surety paying a lien debt is recognized. But one who pays off taxes on the estate, though compelled by his position to do so, and thus acquiring a demand, is not subrogated to the tax lien. The statutory rule governs liens by operation of law and liens by contract alike. (Spratt's adm'r v. First Nat. Bank, 84 Ky. 85; Masonic Savings Bank v. Bangs' adm'r, *Ibid.* 135, 144.)

⁷ Affidavit is to be made by the

claimant, or, in his absence from the State, by his agent, that “the demand is just, and has never to his knowledge or belief been paid, and that there is no offset or discount against the same or any usury therein.” If there is a payment, offset, discount, or usury, it should be stated in the affidavit. (G. St., Ch. 39, Art. II, Secs. 35, 36.) Discount means a partial defense. (Trabue's ex'r v. Harris, 1 Met. 597.)

⁸ See *infra*, under Bonds of Executors and Administrators.

⁹ Berry v. Graddy, 1 Met. 555.

distributees, it is competent for the personal representative or other party bringing such an action to call upon any person supposed to make a claim against the estate, by proper allegation, and to force him into a litigation of such claim then and there; and a judgment rendered in the course of such litigation will bar the supposed creditor, as well against the heirs, etc., as against the personal representatives.¹⁰

The statute on Idiots and Lunatics¹¹ directs: "If the estate of a lunatic or person adjudged to be incapable of managing his estate be not sufficient to pay his debts, the same may, by a Circuit Court or Chancery Court, be ordered to be sold, and proceeds distributed, etc., as . . . the estate of insolvent decedents." Hence, such estate can not be set aside for the support of the lunatic to the exclusion of his creditors.¹²

SEC. 131. THE LAW AGAINST PREFERENCES. By an act of March 10, 1856, it was declared that "every sale, mortgage, or assignment made by a debtor in contemplation of insolvency, and with the design to prefer one or more of his creditors to the exclusion in whole or in part of the others, shall operate as an assignment and transfer of all his property and effects, and shall inure to the benefit of all his creditors in proportion to the amount of their respective demands, including those which are future and contingent," with other clauses subordinate to this object.¹ An act of February, 1862, made the law much more sweeping by adding after "sale, mortgage, or assignment" the words "and any judgment suffered by any defendant, or any act or device done or resorted to by a debtor,"² which seems to leave no room for escape. The law thus amended is inserted in the General Statutes³ under the somewhat misleading title of "Fraudulent Conveyances in contemplation of Insolvency," while the proper title would be, "Unlawful Prefer-

¹⁰ C. P., Sec. 434. *Hood's adm'x v. Hood's devisees*, 80 Ky. 39.

¹¹ G. S., Ch. 53, Art. II, Sec. 25.

¹² *German Nat'l Bank v. Engeln*, 14 Bush, 708; *contra in re Latham*, 4 Iredell's (N. C.), Eq. 235.

¹ Stan. Rev. St., Vol. I, p. 553.

² Myers' Suppl., p. 239.

³ G. St., Ch. 44, Art. II. The original act was called "An Act to prevent Fraudulent Assignments," etc., because preferences, while allowed by law, were often given to secure fictitious debts. In popular language, this article of the General Statutes is still known as "the Act of '56."

ences.” But in spite of the misleading title, the courts enforce the statute only where a real creditor is being actually preferred, not where the sale or mortgage is wholly colorable, or where the debt which seems to be provided for is fictitious.⁴

I. *Territorial Scope of the Law.* Where land lying in Kentucky is sold by way of a preference, the statute applies, though the act of selling be done outside of the State.⁵ But where a non-resident abroad assigns goods which are found in Kentucky, the question of applying the law was, in an early case, left doubtful, with an inclination to the affirmative.⁶

II. *Modes of Preference.* In 1867 Judge Robertson held (notwithstanding the amendment of 1862) that a debtor had the undoubted right to prefer a bank debt by payment in money; but the court has since intimated that payments in the ordinary course of business even (such as by a banker to his depositors) are within the statute, if the contemplation of insolvency and design to prefer exist.⁷ A payment by check, being an assignment of the debtor's demand on his bank, is clearly within the statute.⁸ Where the debtor sells his property on purpose, and pays some of his creditors with the proceeds, there is a “sale” within the law as it stood even before 1862.⁹ Many of the reported cases are too plain to have admitted of a doubt; such as where the debtor sells property to the creditor himself and deducts the debt from the price, or where he appoints the favorite creditor his agent to sell property and pay off his debts, and the agent accordingly pays his own demand first.¹⁰

⁴ *Millett v. Pottinger*, 4 Met. 213, decided before the Gen. Statutes, but would undoubtedly be followed now.

⁵ *Brown v. Early*, 2 Duv. 369. The decision is put on the ground of the *lex rei sitæ*, though the grantor was a resident of Kentucky when he made the sale, which must have been decisive.

⁶ *Lehmer v. Herr*, 1 Duv. 361. The case went off on actual fraud.

⁷ *Davis v. Gardiner*, 1 Bush, 272; *McAfee v. Bland*, 11 Ky. Law Rep. 1.

⁸ *Taylor v. Taylor*, 78 Ky. 470. It

was said, moreover, to be a “device.”

⁹ *King v. Moody*, 79 Ky. 63; and so if he transfers the notes received on a sale made in good faith. (*Temple v. Poyntz*, 2 Duv. 276.) But the purchaser himself, if acting in good faith, must be protected.

¹⁰ *Applegate v. Morrill*, 4 Metc. 22, under the original act. That the agent paid first those demands in which he was interested, was considered the natural result of the discretion given by the principal, and became the act of the latter.

That the forms by which the preference is worked out are wholly immaterial was strongly stated in these words: "Any other mode (other than a sale or assignment) chosen with the same object and operating to the same end . . . should be considered an assignment."¹¹ An execution was so considered which the favored creditor had obtained thus: the debtor had stepped over into a neighboring county where a term of court would be held earlier than in the county of his residence, and allowed himself there to be served with process at the suit of his friend, and then returned home before others could sue and summon him in the same county.¹² But under all circumstances it must be the device of the debtor. For instance, should A. holding a bond, bill, or note against B., an embarrassed debtor, seek out C., who owes B. an account, and sell his note to C. to be used as a set-off, it is hard to see how the arrangement could, under the statute, be disturbed; but should B. have aided in bringing A. and C. together, there would be a "device" within the meaning of the law.

III. *The Contemplation of Insolvency.* According to the run of decisions these words of the statute seem to mean that at the time of giving the preference the debtor knows that his assets are insufficient to meet his liabilities, and that he will be unable to pay all his creditors in full; not that he is still solvent at the time, but fears that by future losses he may become insolvent.¹³ Knowledge on the part of the creditor to whom the preference is given is not required by the statute nor by the decisions under it.¹⁴ Wherever the contemplation of insolvency is found, and there is an act of preference, the design to prefer is implied.

IV. *To Prefer one or More Creditors.* A surety is not literally a creditor, but an attempt to protect him falls under the

¹¹ Letcher v. Stagner, 2 Duv. 424.

¹² Wilson v. Snelling, 3 Bush, 322.

¹³ McCann v. Hill, 85 Ky. 574, 580.

"The record shows that at the time M. was insolvent; that at the time he executed the mortgage he knew that he was insolvent;" that the debtor, though he must have known his in-

solvency, hoped "to pull through;" can only be proved by his own say-so, and will not excuse a preference. (Hoffman v. Berings, 83 Ky. 400.) Even if he don't know his insolvency, but knows he will fail, a preference given comes within the law.

¹⁴ Drake v. Ellman, 80 Ky. 484.

denunciation of the law, as in doing so the creditor must be paid. Hence, a mortgage on which the surety lends money to the debtor, which the latter uses to pay the creditor, works an assignment.¹⁵ But in a later case where the indorser advanced to the acceptor means for paying a bill, the drawer of which, standing between the indorser and danger, seemed to be solvent, Judge Robertson upheld the mortgage given to secure the advance.¹⁶ It will be shown in the next section that any plan of distribution differing from that made by the law is an unlawful preference within its meaning.

V. *To the Exclusion of Others.* Where a debtor induces his wife to give up her own property to a favored creditor, or where he surrenders his homestead or goods that are exempt from seizure at law, the preference does not work to the exclusion of other creditors, and they can not complain.¹⁷ More difficult is the question whether the party to whom property is turned over has not a previous equity therein, or a lien upon it, in which case the debtor does not, by giving him such property, deprive his other creditors of any substantial benefit. Some of these cases have been treated in our Sections 92 and 120, concerning liens on real or personal estate. Where the debtor has received advances on a crop, on logs, or on articles that are being worked up, we have seen that there is what the court calls an "inchoate lien," which may be perfected by delivery, but which will not prevail against intervening equities, even of the seller's general creditors;¹⁸ yet if the seller carries out the agreement by actual delivery, complying with a contract which could not have been enforced, his other creditors can not complain under the law against preferences.¹⁹ And so

¹⁵ *Terrell v. Jennings*, 1 Metc. 450, and *McCann v. Hill*, and *Thompson v. Heffner*, quoted in n. 13.

¹⁶ *Davis v. Gardiner*, 1 Bush, 272. As a matter of good pleading, the design to prefer the creditor, not to protect the surety, should be averred.

¹⁷ See *supra*, Secs. 90 and 111. See also *Fuqua v. Terrell*, 80 Ky. 69. *Qu.* Whether the property in that case was really exempt.

¹⁸ *Supra*, Sec. 120, note 8.

¹⁹ *Vinson v. McAlpin*, 87 Ky. 357. It was said that the buyer making advances is not a creditor, as he is not entitled to any money till the contract to deliver goods is broken. He is, however, a creditor contingently. In this case the insolvent seller had contracted with sundry land owners for trees, and these were not yet marked when he contracted to sell them.

when the insolvent, having made a parol agreement with his co-defendant, by which the latter advanced him several hundred dollars, for which he was to convey a tract of land, "it was held that the transaction did not create the relation of debtor and creditor, . . . until the parol contract had been repudiated by the insolvent," and a deed made in pursuance of the agreement was sustained against an attack under the "act of 1856."¹⁹ But where the seller, instead of delivering the goods in pursuance of the contract, mortgages them to the party who made the advances, he recognizes him as a creditor and prefers him within the meaning of the statute.²⁰ Several cases heretofore quoted, in which it was held that no lien or equity was raised in favor of a creditor or surety, came up on the question of an unlawful preference.²¹

VI. *The Proviso.* "But nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution."

The clause was inserted for fear that the act might otherwise be too sweeping, and endanger those lending money on mortgage; but, as one lending money upon a present security is not within the "body of the act," he gains nothing from the saving clause, and may lose by the proviso to the proviso if he have not recorded his mortgage within thirty days. Thus, where the insolvent gave to one of his creditors a mortgage to secure the old debt and a new loan, and it was not recorded within thirty days, it was upon petition of the other creditors set aside altogether, so that the mortgagee could only claim his dividend on both debts.²² If it had been recorded in due time it would have stood good to the extent of the new loan; though an "insignificant" amount of old debt embraced therein will turn it into a general assignment.²³

¹⁹ *Napper v. Yager*, 79 Ky. 241; for above abstract from it, see 87 Ky. 362.

²⁰ *Hoffman v. Berings*, 83 Ky. 400.

²¹ See Sec. 113, n. 4; Sec. 120, nn. 7 and 8.

²² *Farmer v. Hawkins*, 79 Ky. 182. The actual knowledge of the other creditors could not supply the want of lodgment for record.

²³ *Whitaker v. Garnett*, 3 Bush, 402, 411.

A renewal of the old debt in the shape of a new note will not save the pledge or transfer to secure or satisfy the latter, not even if a new security were given to a "colluding stranger."²⁴

VII. *The Suit.* While a transfer which is actually fraudulent may be treated as void whenever it comes in the way of any party whom it is apt to hinder in his rights and remedies, a sale, mortgage, assignment, or other device denounced by the law against preferences is good and valid for all purposes,²⁵ unless it be assailed in the manner and within the time named in the law.²⁶ "All such transfers . . . shall be subject to the control of courts of equity, upon the petition of any persons interested filed within six months after the mortgage or transfer is legally lodged for record, or the delivery of the property or effects, etc." (Section 2 of Article II.) The surety of the debtor is a "person interested" who can bring the suit; so is the assignee of a surety, and so is even the surety on the bond of a trustee who has put trust funds in the hands of the insolvent, as he may be called upon to make good the loss, and would then be subrogated to his principal as a creditor.²⁷ "Any number of persons interested may unite in the petition" (Section 3), and such suits are generally brought by one or more creditors.

VIII. *The Time Limit.* The section limiting the time of the remedy is framed with a view to the "sale, mortgage, or assignment" of the act of 1856. The courts are left to work out the rule as to the date from which the period of six months is to be counted where the preference is given by other devices.

The six months' bar stands on a higher ground than an ordinary limitation; delay is excused neither by the disability of the plaintiff nor by the defendant's absence from the State.

²⁴ In *Temple v. Poyntz*, n. 9, these words are used. See also *Terroll v. Jennings*, note 15.

²⁵ *Givens v. Gordon*, 3 Metc. 539.

²⁶ *Wintersmith v. Poynter*, 2 Met. 487; *Whitehead v. Woodruff*, 11 Bush, 209, where there are several acts of preference, and the suit is brought

within six months of the last act only, the preceding ones stand good.

²⁷ *McKee v. Scobee*, 80 Ky. 124; *McAfee v. Bland*, 11 Ky. Law Rep. 1. A judgment and a return of No Property is, of course, not needed. (*Griffith v. Cox*, 79 Ky. 562.)

A petition to break a preference, if it does not show affirmatively that the act complained of took place within six months, must, at least, in order to be good on demurrer, not show that it occurred sooner.²⁸ Where the transfer of a chose in action is the ground complained of, the time counts from the day of the transfer, though no notice thereof was given to the other creditors.²⁹ Where the debtor has first sold land by title-bond, and delivered possession, and afterward made his deed in pursuance of the bond, it was left undecided whether the time would run from the former or from the latter act.³⁰

Where the act of preference was a collusively obtained judgment and execution, under which the debtor's land was sold, but the execution had not been returned nor possession given of either land or crop when the suit to work out the trust for all the creditors was brought, the Court of Appeals, in rendering judgment to set aside the preference, said that "the six months, so far from having expired, had not begun to run."³¹

The suit must be begun in accordance with Section 39 of the Code of Practice by filing the petition, and either having summons issued, or (when the defendant is a non-resident, etc.) causing a warning order to be made. And where the original petition proceeds on other grounds (for instance, where it seeks to set aside the conveyance for fraud, or attacks another disposition of the debtor's property), and the grounds under the act of 1856 are made out in an amended petition, the process on that amendment, both against the debtor and against the transferee, must be issued within the six months.³²

IX. *Rights of "Other Creditors."* While a judgment establishing the unlawful preference puts the suit out of the power

²⁸ *Wintersmith v. Poynter*, n. 26, qualified as above in *Story v. Graham*, 4 Metc. 319.

²⁹ *Cogar v. Stewart*, 78 Ky. 59. A demand by note is delivered by the delivery of the note; a demand not based on a writing, by giving a written assignment.

³⁰ *Napper v. Yager*, see n. 19^a.

³¹ *Wilson v. Snelling*, 3 Bush, 322, 327.

³² *Cecil v. Soward*, 10 Bush, 149. See also *Hoffman v. Berings*, *supra*, n. 20, where the grantee was a non-resident, and the entry of a warning order was a proper way to begin the suit as against him.

of what may be called the "petitioning creditor," yet before such judgment the plaintiff has full control over his suit and may dismiss it at any time. This is often done by arrangement between such plaintiff and the defendants when the time limit has expired, and no new suit can be brought by any one else. To avoid this result, creditors other than the plaintiff may apply before the end of the six months to have themselves made parties to the suit; and when this is done, the case can no longer be dismissed by the original plaintiff without the consent of the new comers, and these may go on to prosecute the case for their own benefit and that of all concerned should the plaintiff step out.³³

X. *The Full Effect of the Judgment.* The third section proceeds: "But it shall not be necessary to make any person defendants except the debtor and the transferee." The act of preference, like an act of bankruptcy under the old English Bankrupt Law, so well known to the American student from the "leading case" of *Cooper v. Chitty*, when construed into a general assignment by the subsequent decree of the proper court, has the same effect as if an assignment had actually been made at the same moment when the preference was attempted, and will therefore take precedence of any attachment, execution, voluntary assignment for the benefit of creditors, or other charge upon any part of the debtor's property later in time than the attempted preference, though earlier than the filing of the petition by the complaining "interested parties."³⁴ But one who in good faith, without notice of the preference or of the circumstances bringing it within the law, buys a part of the debtor's estate for value, or lends money thereon, taking a pledge or mortgage, will be protected as a *bona fide* purchaser.³⁵

³³ *Sawyers v. Langford*, 5 Bush, 541.

³⁴ *Shouse v. Utterback*, 2 Metc. 52, the leading case, where the levies of attachment were superseded; *Grimes' assignee v. Grimes*, 86 Ky. 511, where a subsequent deed of assignment is thrown out.

³⁵ *Southworth v. Casey*, 79 Ky. 395.

Here the same person received a stock of goods, partly in payment of a debt, partly for cash, and afterward in good faith bought for cash a tract of the debtor's land; he was allowed to prove the cash paid on the goods as a preferred debt, and to retain the land.

But in the leading case those holding the intervening claims had been made defendants to the petition, notwithstanding the clause quoted, under which the debtor and transferee alone are necessary defendants. And this clause has since been construed to mean only that it is not necessary to bring in other creditors, but a transferee from the transferee is properly named as a defendant.³⁶ It might hence be inferred that unless the intermediate encumbrancers were brought before the court within the time limited after the act of preference, the liens gained by them could no longer be disturbed.

When the judgment declaring the effect of an unlawful preference is rendered, there is a legal, not merely an equitable transfer of the debtor's property. Hence, every creditor stands in the position as if his or her claim was secured by a recorded deed. A person *sui juris* might be concluded by the published notice, and presumed to have abandoned his claim, if he does not appear and prove it in time; but an infant would not be thus concluded, and may bring his suit against the creditors who have wrongfully drawn his share of the debtor's property from the fund in court.³⁷

XI. *Distribution and Other Subsequent Proceedings.* By Section 3 of the article it is further directed that the "proceedings as to the mode of proving claims and otherwise" shall, as far as can be done, conform to the law for the settlement of decedent's estates. This must include that rule of marshaling assets which compels a lien creditor to choose between his encumbrance and his dividend;³⁸ but by a whim of the revisers a priority is given to "debts due as guardian,³⁹ or administrator, or executor," leaving out the committee of a lunatic mentioned in the law for settling decedent's estates, and to "debts due as trustee, if the trust be created by deed or

³⁶ *McAllister's adm'r v. Savings Bank*, 80 Ky. 686.

³⁷ *Roberts v. Phillips*, 80 Ky. 11.

³⁸ See *supra*, Sec. 130, nn. 3 and 5.

³⁹ A preference having once been attempted, the right of wards to their priority under the statute became fixed, and could not be displaced by

assignments made afterward for an equal distribution among creditors. *McKee v. Scobee*, 80 Ky. 124; (see also n. 37). A Kentucky trustee or guardian has the choice, when insolvent, to give a priority to his fiduciary debts, or to put them on an equality with his other debts.

will duly recorded, etc.," a class of debts which is not preferred in the other case. Moreover, a late case intimates that the rule for marshaling assets is not the same in winding up a decedent's estate as in a distribution under the act against preferences.⁴⁰

Section 8 requires also the form of verification which is made on a demand against decedents to be used here. Sections 4, 5, 6 regulate the proceedings, and the first of these sections authorizes the court to compel the transferee to deliver up to its receiver the debtor's property in his possession, even before judgment annulling the preference, and to deal after the judgment in like manner with all the property of the debtor. But the court has no power, before such judgment is rendered, to sell the lands of the debtor, though they be mortgaged, or to take any thing out of his possession and to put it into that of a receiver except on the same grounds on which receivers may be appointed and be put in charge of property in other cases.⁴¹

NOTE.—Under the title "Insolvent Debtors," Chapter 58, Article I, of the General Statutes treats of the disposition of such assets as an imprisoned debtor may surrender by schedules in order to obtain his discharge. The matter is of too little practical importance for our purpose.

SEC. 132. PARTNERSHIP AND INDIVIDUAL CREDITORS. The courts of Kentucky recognize the rights which partnership creditors have upon the assets of a failing partnership, and follow the well-known doctrine that such creditors have no independent lien, but that they derive their priority only through the partners, each of whom has the undoubted right to insist that no part of the firm assets shall be divided before all the debts and liabilities of the firm are paid. We have, under the head of Execution Sales,¹ shown how thoroughly the ownership by all the partners of the partnership assets overrides the lien of firm creditors, and we would thence infer that an assignment in which all the partners join, in trust, to have their individual, alike with their firm creditors, paid out

⁴⁰ Spratt's adm'r v. First Nat. Bank, 84 Ky. 85, 91.

⁴¹ Griffith v. Cox, 79 Ky. 562.

¹ See *supra*, Sec. 111, n. 10.

of the firm assets, could not be set aside as being "voluntary" and fraudulent. However, an order once given by the partners in an insolvent firm to their agent to sell the assets and pay the debts *pro rata* can not be revoked after the sale.² But any distribution made voluntarily on different principles than the rules of law is an unlawful preference within the act of 1856.

The rule established under the British and American bankrupt laws, to distribute partnership assets among the partnership creditors, the individual assets among the individual creditors, proceeds on the theory of treating the firm like an incorporated company, and has its simplicity, but nothing else, to recommend it. Often this rule will result in giving a larger dividend to those who have only one debtor than to those who have several joint debtors.

Under the lead of Judge Robertson the Court of Appeals undertook in 1865 to lay down an independent rule for Kentucky without pretending to find for it any precedent either in England or America, but claiming that this new rule occupies a middle ground between two extremes. It is truthfully argued that the firm creditors do not trust the firm alone; they may have given credit in reliance on the private wealth of one or all of the partners; and in the case before the court³ a voluntary assignment is set aside as giving an unlawful preference, because it directed the individual creditors to be paid first out of the individual assets: "We therefore feel that it is our privilege and duty to recognize and apply what on a survey of cases and *dicta* we believe to be the true doctrine, which is, that if partnership creditors exhaust the partnership estate without full payment, the individual creditors have the reciprocal right to make as much out of the individual estate; and if then any individual property should remain undisposed of, it shall be distributed *pari passu* among all the creditors regardless of class." It is very difficult to apply the new rule when more than one partner has both assets and creditors of

² Black v. Bush, 7 B. M. 210; a weak case, as only one of the partners attempted to revoke the order by assign-

ing his share of the proceeds.

³ Northern Bank of Ky. v. Keizer, 2 Duv. 169.

his own. The rule was followed in the following year in distributing the assets of a deceased member of an insolvent firm,⁴ and has been acquiesced in ever since. Contrary to the rulings under the Federal bankrupt law it has been held that where a firm creditor has the names of individual partners as sureties on a firm note, he can not "prove" against all the estates, but must make his choice to be considered either an individual or a firm creditor.⁵ But he may prove against the estate of each individual who has become liable to him as such. And where a lien is given to a creditor of either class by contract, the rules established between firm and individual creditors can not displace it.⁶

SEC. 133. SUBROGATION. We have given instances of the allowance or refusal of subrogation (often called substitution) under the heads, Homestead,¹ Vendor's Lien,² Transfers of Choses in Action,³ Decedent's Estates,⁴ and elsewhere, and will discuss one kind of subrogation under the head of Assignor's Liability on Notes not Negotiable.

As questions of subrogation arise oftenest in the distribution of estates, we may here collect a few points and cases on the doctrine, for which no place has been found elsewhere.

A mortgage given by a debtor to indemnify his sureties (not, however, one given by a stranger in which the contrary intent is shown) enures to the creditor who may sue on the mortgage in his own name.⁵ And so, where a note or other security is given by A. to raise money for B.'s benefit, and it is assigned to C., who advances part of the money secured by

⁴ Whitehead v. Chadwell's adm'r, 2 Duv. 432.

⁵ Fayette Nat'l Bank v. Kenney, 79 Ky. 133.

⁶ Spratt's adm'r v. First Nat'l Bank, 84 Ky. 85.

¹ See *supra*, Sec. 91, Subsec. 2.

² See *supra*, Sec. 92, nn. 14, 15, 26.

³ See *supra*, Sec. 113, n. 7.

⁴ See *supra*, Sec. 130, n. 6.

⁵ Bank of U. S. v. Stewart, 4 Dana, 27. In Taylor v. Farmers Bank, etc., 87 Ky. 398, the debtor's wife gave a

mortgage on her own land to indemnify the surety, "but he must not allow any loss to fall upon him if he can lawfully prevent it; and this is not made for securing any part of the claim." The surety being insolvent, and having never paid any thing, it was held that the payee could not recover on the mortgage. Same principle, Macklin v. Northern Bank, 83 Ky. 314. The mortgage from the stranger to the surety was deemed "personal."

it, and D. advances the rest of the money on the faith of the note, D. will be subrogated *pro tanto* to the benefit thereof.⁶ But one who pays for the release of a mortgage less than its face, and does not get it assigned to him, will be substituted to its benefit only to the amount which he pays.⁷

The equity of the surety overrides that of an equitable assignee, though for value. Thus, where after judgment against principal and surety the former delivered to the plaintiff's attorney some notes, with orders to collect them and to pay the proceeds on the judgment, and afterward for value sold and assigned the receipt given him by the attorney to a stranger, the surety, who had to pay the judgment, was preferred to the assignee; that is, the attorney was ordered to pay the avails of the notes to the surety.⁸ In fact, it was thought that the assignee was by the receipt put upon inquiry as to the purpose for which the notes had been delivered.

Where the owner or part owner of a stock in trade subject to debts sells it to one who agrees, as part of the price, to assume those debts, the creditors may (at least in equity) sue the purchaser, and each of them recover his demand by way of subrogation to the seller's rights.⁹

An heir or distributee, on paying the decedent's debt, is subrogated to the claim as against his co-heirs for their share, and all the heirs to the remedy against the administrator.¹⁰ One who furnishes money to remove an encumbrance on the lands of a lunatic has, independent of statute, a lien for his reimbursement by way of equitable subrogation, though the encumbrance itself have been lifted and be gone.¹¹

A replevy bond discharges the lien of an execution; but

⁶ *Baker v. Ward*, 7 Bush, 240. The question here verges on the liability of accommodation makers, to be treated in another chapter.

⁷ *Mallory v. Danber's ex'r*, 83 Ky. 289.

⁸ *Dunlap v. O'Bannon*, 5 B. M. 393.

⁹ *Francis v. Smith*, 1 Duv. 121.

¹⁰ *Taylor v. Taylor*, 8 B. M. 419; *Place v. Oldham*, 10 B. M. 400.

¹¹ *Coleman v. Fraser*, 3 Bush, 309; and this was held, though the money had been furnished as part of a scheme to defraud the lunatic. And where the committee in good faith had an execution against the lunatic's estate enjoined, and his sureties, upon dissolution of the injunction, had to pay the amount, they were given a lien on the estate by way of subrogation.

the surety in the bond gains no lien. To give him a lien would defeat the object of the law, which allows a stay of three months on judgments and executions.¹²

It was held, on the ground of subrogation, that where two equitable charges had been put upon land, the second encumbrancer having no notice of the first, and after both of them there was a recorded mortgage, the takers under which had notice of the second, but not of the first charge, that the Chancellor must consider that to be done which ought to be done, viz., a transfer of the mortgagee's title to the equity of which he knew; and on this ground the court gave to the second and public equity priority over the first, which was secret.¹³

An agent, who to protect his principal's interest pays a debt for him, has the same right of subrogation that a surety would have.¹⁴

It was also held on the ground of this doctrine, where one bought and paid for a chattel under an execution to be levied *de bonis testatoris*, and was evicted in detinue by better title, that he should be substituted to the demand of the creditor whom his purchase money paid, and recover the amount from the decedent's estate; and this, though he knew of the adverse claim.¹⁵

The subrogation of the sureties to the priority given by the law for distributing decedent's and other estates need not be worked out by equity, for the very words of the statute give it "the amount of an estate . . . committed to . . . decedent"¹⁶ shall be first paid; no matter to whom it is paid, whether to the person entitled, or to a bondsman who has advanced it.

¹² Fishback v. Bodman, 14 Bush, 117, following Bank of Hopkinsville v. Rudy, 2 Bush, 326.

¹³ Stephens v. Benton, 1 Duv. 112. Twenty bonds in excess of the first mortgage are an unrecorded charge; next comes a *public* issue of income bonds, unrecorded; then the new mortgage. The priority of the income bonds over the twenty older irregular bonds is worked out on the ground

stated in the text; but a sentence hard to understand is added: "But if there should be a surplus after paying the (last) mortgage, the holder of the twenty bonds will be entitled to it in preference to the holders of the income bonds."

¹⁴ Curry v. Curry, 87 Ky. 667.

¹⁵ McLaughlin v. Daniel, 8 Dana, 182.

¹⁶ Gen. Stat., Ch. 39, Art. II, Sec.—

The substitution of carriers paying for lost goods, and of underwriters in like position, to the rights of the owner, is touched upon in one case, but not sufficiently to develop any local doctrine on the subject.¹⁷

A sheriff who has by neglect laid himself liable to pay the amount of an execution to the plaintiff, and has paid him from his own means, is subrogated to the plaintiff's rights, and may have the execution reissued for his own benefit.¹⁸ As to the collection of the public revenue, his right to collect for himself the arrears for which he is responsible is recognized by statute.¹⁹ A similar right of subrogation would be given to any other officer of the law, or to an attorney who, having become bound to make good a demand lost through his neglect, had paid it from his own means.²⁰ The claim which the obligor in one bond may have against the obligor in a *different* bond for the same debt does not belong here.

SEC. 134. CHARGES OF DISTRIBUTION. While the statute fixes the commissions of executors and administrators, it is silent as to the commissions of trustees. The old English rule, that a trustee is only entitled to his outlays, has long become obsolete;¹ but the compensation rests in the sound discretion of the court, and usage has fixed it in most cases at five per cent of the amount which passes through his hands. It has, however, been expressly adjudged that there is no hard-and-fast rule fixing this percentage as the reward of the trustee; the rate should be apportioned "according to the nature and responsibility of the trust, and the length, fidelity, and success of the service."² A "guardian, besides all neces-

¹⁷ Cin., H. & D. R. R. v. Spratt, 2 Duv. 6.

¹⁸ Ronald v. Howard, 7 B. M. 467.

¹⁹ Revenue Act of 1886, B. and F. Gen. Stat., p. 1083. An attempt of the sheriff's sureties (he having absconded) to recover arrears by suit in equity was defeated on the plain ground that the taxes, not being debts, can not be coerced by suit at law or in equity.

²⁰ Williams v. McKee, 5 J. J. Mar. 289 (a very unsatisfactory statement of facts).

¹ Philips' adm'r v. Bustard, 1 B. M. 349 (1841). Here, for the first time, Judge Robertson by judicial decision sets aside the old rule.

² Fleming v. Wilson, 6 Bush, 611. This was not a trust for creditors, but for the benefit of an infant, with an accumulation till she came of age.

sary disbursements and repairs, shall be allowed by the court a reasonable compensation for his services.”³ Every fiduciary may, for the purposes of the trust, employ counsel where such purposes demand it, and pay them a compensation out of the trust fund;⁴ but a difficult question arises, where the trustee or guardian is himself a lawyer and performs the legal work, for which a layman in his place would have to employ a member of the profession. It is clear that he can not bring in his bill as a lawyer upon the employment by himself as trustee or guardian, but it seems that the work done by him in his professional capacity may be considered in the gross reward of his whole service. The only Kentucky case on the subject was decided in April, 1890, by the Superior Court. It was said that the services done in the capacity of lawyer must be estimated, not at the price which a lawyer might reasonably charge for the work, or which a trustee employing a lawyer in good faith might be justified in paying, but only according to the benefit which resulted to the trust.⁵

Under a law first enacted in 1860,⁶ where in actions for the settlement of estates, or for the recovery of money or property (held jointly), one or more of the parties in interest have prosecuted for the benefit of others in interest with themselves, and have been at trouble and expense therein, it is the duty of the court to allow reasonable compensation for the trouble and expenses to be paid out of the funds recovered before distribution, after notice to the parties interested in the allowance. In effect this means giving to the plaintiff's attorney a fee out of the fund in court; most frequently where a suit is brought by one or more creditors to set aside an attempted preference, to take an assigned estate out of the hands of an unacceptable trustee, or to force a speedy winding up of a decedent's estate against the wishes of the personal represent-

The fund was increased in fifteen years from \$7,725 to \$20,346. The Court of Appeals allowed 1½ per cent annually on the fund in his hands to be credited at the end of each year.

³ Gen. Stat., Ch. 48, Art. II, Sec. 11.

⁴ Newport Bridge Co. v. Douglass,

12 Bush, 673, 721.

⁵ Kentucky Nat. Bank v. Stone, 11 Ky. Law Rep. 948. (Now in C. A.)

⁶ Now part of Gen. Stat., Ch. 24, Sec. 15; original act of March 10, 1860; Myers' Suppl. p. 107, enlarged in 1868; Sess. Acts, 1867, 1868, p. 25.

ative, or where such a settlement is pressed by some of the legatees or distributees more impatient than the others. The allowance is nearly always made to the attorneys direct, not to the plaintiffs. It must in justice fall ultimately, like an ordinary lawyer's fee, on the persons for whom the service was rendered, and can not, where they are creditors, be charged as costs on the common debtor, a point which is often overlooked in practice.

The law has been construed by the Court of Appeals in one case, and it was held that where other parties beside those stirring the suit are represented by attorneys of their own choice, that such parties need not contribute to the allowance under the statute. Hence, where the plaintiffs in a suit for the division of an estate controlled three eighths of it, opposing defendants having counsel of their own held other three eighths, and two eighths were unrepresented, and \$1,000 was found to be the value of the services rendered by the lawyers conducting the suit, they were allowed to draw \$625 out of the five eighths of the fund that belonged to the plaintiff's side and to the unrepresented defendants; but the three eighths which belonged to the defendants represented by counsel were not to be broken in upon.⁷ It would follow that the fee for setting aside a preference should fall on those creditors only who gain thereby, and that no part of it should be charged to the "transferee" when a dividend is allotted to him. But the right of the plaintiff's attorney to his fee for the service done can not be displaced by the employment of attorneys in the subsequent stages of the proceeding. An executor or administrator is generally allowed his counsel fees out of the estate for any litigation carried on in its name; but there are cases in which the representative is the only party in interest, and makes a contest for his own good, that form an exception to the rule.⁸

The person named as executor in a paper purporting to be a valid will, and which is probated by the County Court, if he

⁷ Thirwell's adm'r v. Campbell, 11 Bush, 163.

⁸ Wood v. Goff's curator, 7 Bush, 59.

acts in good faith in seeking to establish such paper, is allowed his counsel fees out of the estate, though it should be rejected as a will.⁹ But an unsuccessful contestant is never allowed his counsel fees out of the estate; and as a general rule a party who does not establish his claim upon a fund is, under our law, not even entitled to have any of his costs paid out of such fund. The practice of some of the Eastern States granting liberal fees to counsel of all parties, to the detriment of the estate, is wholly unknown in Kentucky.

⁹ The courts of Kentucky herein follow the common rule; and it may be implied from the ruling in *Mizner v. Pryor*, 79 Ky. 232, that an executor who has no devise or bequest under the will is a proper party for carrying on the contest in favor of its being established.

CHAPTER XXI.

CHARITIES AND CHURCHES.

SEC. 135. Charitable Uses.

SEC. 136. Dedication and Discharge of Trust.

SEC. 137. Dependent Churches.

SEC. 138. Independent Churches.

SECTION 135. CHARITABLE USES. In 1834 the Court of Appeals declared¹ that the act of 43 Elizabeth, known as the Statute of Charitable Uses, had never been repealed, and that its character is not so local as to exclude it from the adoption of the general laws of England and Virginia. The Revised and General Statutes re-enact its material parts in two sections,² which are modified by a third, and which, when stripped of verbiage, amount simply to this:

“SEC. 1. All grants, devises, appointments, etc., heretofore or hereafter made in due form of law, of any lands, goods (or other thing), for the relief of aged and poor people, etc. (pretty much as in the preamble of the English act), churches (which are named in the English act only as to “repairs”), or for any other charitable or humane purpose, shall be valid except as hereinafter restricted.”

“SEC. 2. No charity shall be defeated for the want of a trustee, etc., but courts of equity may uphold the same by appointing trustees, or by taking control of the . . . property, and *directing its management, and settling who is the beneficiary thereof.*”

The second section goes far to remove the objection of “uncertainty” in bequests to charities.

The only restriction is a clause with which the third sec-

¹ Gass & Bonta v. Wilhite, 2 Dana, 170; the act is printed at large as in force. in M. and B. Stat., I, 308.

² Gen. Stat., Ch. 13, Secs. 1 and 2. (Ch. 14 in Revised Statutes.)

tion opens, forbidding any church or religious society from acquiring title, in law or equity, to more than fifty acres of ground,³ "but (it) may . . . hold that quantity for the purpose of . . . houses of worship, public instruction, a parsonage, a graveyard, or a horse-pound," which enumeration of purposes seems to bar religious societies from holding lands even in smaller quantities than fifty acres for the purpose of drawing the rents and profits thereof.

It goes without saying, that in construing the first section no distinction can be made between lawful and "superstitious" uses.⁴ Funds are often set aside in wills to be expended on singing of masses; the lower courts acknowledge the validity of such bequests, and they would almost certainly be recognized by the Court of Appeals.

The mortmain clause, by its terms, applies as much to a general body, such as the "Methodist Episcopal Church, South," as to a single congregation; but where a devise is made to a body of either description for a definite end, such as foreign missions, the church is considered as a mere trustee, and the trust can not "fail for the want of a trustee."⁵

And this devise was said not to be too vague. "The trustee (meaning the M. E. Church, South) is named in the will, and the language used by the testator indicates definitely the purpose to which he desired his bounty to be applied."

The *cy pres* doctrine, which in the words of Judge Robertson was an "excrescence" or "tumor" on the English statute,

³ Most charitable institutions, and any churches that ask for them, have special charters in which the measure of property, landed or otherwise, which they may hold, is prescribed in money value: this leaves little weight with the general statute of mortmain. Before 1852 churches not organized under such charters were not restricted in the acquisition and holding of lands by any law of mortmain.

⁴ In *Gass v. Wilhite*, a donation to the Shakers "according to their cov-

enant" was sustained, with the remark that neither court nor legislature had the right to call any uses superstitious.

⁵ *Kinney v. Kinney's ex'r*, 86 Ky. 610. The court only rejected the claim of the heirs, but did not determine whether it would allow the Methodist Episcopal Church, South, to hold the devised lands even in trust, or would appoint a trustee to lease them and to administer the accruing rents.

was repudiated very soon after that statute was first acknowledged as being in force in Kentucky. "We are satisfied that the *cy pres* doctrine is not and should not be a judicial doctrine except in one kind of case—where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed."⁶ In other words, a Kentucky court of equity can only wield the powers which the Chancellor as an equity judge exerts over trusts, not the visitatorial powers of the Crown over charities. It was declared in 1868, that under the law of charitable uses a devise to an orphan asylum would be good, though it should not have been incorporated, and that the doctrine laid down in the preceding case is the true construction of the present statute.⁷ Where a discretion is left with trustees named by the donor, the Chancellor can not control it by a scheme.⁸

It has often been held in other States, and been intimated in Kentucky, that in order to justify a tax exemption a charity must be general; that a society which bestows its benefits only upon its own members and their families does not, within the tax laws, deserve the name of a charity. The same strictness is not applied in construing the law of charitable uses. The covenant of the Shakers is made for the benefit of the members who live on the fruits of the common labor and common property; it is not helped by a permissive clause, under which the trustee *may* relieve outsiders; but as persons having the required "faith" are admitted to fellowship, though poor, the society was held to be "charitable."⁹

In the very few cases found in the Kentucky Reports, the objection of want of certainty has always been overruled. Thus, a devise "to such charitable institutions as may appear

⁶ Moore's heirs v. Moore's devisees, 4 Dana, 366 (1836).

⁷ Cromie v. Lou. Orphans' Home Society, 3 Bush, 365, 375.

⁸ Attorney General v. Wallace, 7 B. M. 611, 621.

⁹ Gass v. Wilhite, *ubi supra* (p. 100), Judge Nicholas dissenting. He looked

upon the Shakers as a mere partnership, and was willing to give the complainants, who were seceding members, a division as prayed for, which the other two judges denied on the ground of a dedication to a charitable use.

to be most useful in disseminating the Gospel," followed by the nomination of trustees to carry out "all the purposes" of the will, was construed to mean such institutions as the trustees might choose, and therefore certain enough;¹⁰ upon the authority of two earlier cases, one of which seems to us to be much stronger.

Although the duties of the Attorney General are regulated by law, and that of enforcing charitable trusts is not among them, yet the English custom which allows such an officer on the part of the State to maintain a bill in equity on behalf of a charity, is so far in force, that if he lends his name to such a proceeding it will be maintained upon its merits, a relator being responsible for costs and conducting the work of litigation; nor will the Attorney General be allowed to dismiss the suit while it is progressing.¹¹

NOTE.—See also in a later book, as to a charity as a consideration for a promise.

SEC. 136. DEDICATION AND DISCHARGE OF TRUST. The statute of charitable uses only protects gifts, devises, etc., "made in due form of law." But dedications of land without deed, or by deed to persons whose character as trustees is not set forth, have been recognized in Kentucky on the same footing as dedications for public highways.¹

Where the owner of land allows (gratuitously) the members of a congregation to build a church upon it without conveying it to them,² and they take up the timber for the purpose of removal, he may thereafter repossess himself of his land discharged of the pious use.

A land owner had "dedicated" by parol a lot "free for

¹⁰ Attorney General v. Wallace, *ubi supra*, quoting Moore v. Moore, where a will putting money into the hands of the County-Court to educate poor orphans was construed as giving to the justices the right to choose those orphans; and the rather extreme case of Curling's adm'r v. Curling's heirs, 8 Dana, 38, where a devise for

a seminary of an estate too small to found one was turned over to the public seminary of the county which was established *after* the testator's death.

¹¹ Attorney General v. Wallace, *ubi supra*.

¹ McKinney v. Griggs, 5 Bush, 407.

² McDaniel v. Watson, 4 Bush, 234.

the use of all Protestant denominations," and persons of all creeds contributed money from which a house of worship was built. It having fallen into disuse and decay, a congregation of one sect obtained a deed from the heirs of the first donor. Then churches of other sects brought suit for permission to share in the use of the property. The court decided that those sects which had in the mean time provided themselves with houses of worship of their own in the village had no right to participate.³

Where the land for a pious or charitable use is held under the deed of one who sold for value, and the use fails (*e. g.*, it is for the worship of a sect which ceases to have any adherents in the State), such grantor can not reclaim the use of the land with which he has parted for a consideration.⁴

Where a deed or title-bond of church property is made to trustees for a church or charity, the power on their part to encumber it by outlays toward the purchase price and the cost of improvement or repair is implied, where they have acted in accord with the congregation.⁵

The decisions are not very clear as to the manner in which the charitable trusts impressed upon a church lot can be gotten rid of. Of course, a congregation must have power through some organ to sell its house of worship, when in the changes brought about by time the location becomes either unfit for their use, or so valuable for other purposes that the best interests of all concerned would demand a sale; and the same reasoning will apply to an orphans' home, hospital, or other benevolent institutions. Where the church or charity is incorporated, a power of sale is generally granted in express terms.

In 1847 a case arose where a lot and house of worship had been deeded to trustees for the purpose of having Methodist services on two Sundays of each month, and to allow other denominations to worship at other times; and the Methodists of the town, desiring to put up a church of their own, sold out their interest in the place for a named sum to a Baptist com-

³ Baptist Church v. Presbyterian Church, 18 B. M. 635.

⁴ Slaughter v. Morrow, 5 Bush, 330.

⁵ Overstreet v. Bate, 1 J. J. Mar. 567.

munity. The latter sought to have the purchase annulled, claiming the Methodist authorities who released the rights of their church had no power to do so. But the court held the purchasers to their bargain, on the ground that the release was binding.⁶ It is to be regretted that the published opinion does not show whether the release was given by the local Methodist body alone, or was ordered and ratified by the quarterly, the annual, or the General Conference. Moreover, a special act of the legislature was obtained; the court, however, thought this act needless.

Again, at a much later date, in a friendly suit between the trustees of a congregation and the purchaser of a parsonage which had been devised to "the Presbyterians of Hopkinsville," the title was deemed good, but the trustees had been incorporated by special act, with power to sell the church property with the assent of their congregation, and had obtained that assent.⁷

In some of the cases⁸ given in the following sections, the originally dedicated lot had been sold and the proceeds invested in other land, and the latter was, as a matter of course, considered subject to the same trusts.

The sixth section of the chapter on Charitable Uses, etc., undertakes to vest the property of a society that shall dissolve in the county seminary, or if there be none in the county (and it is believed that there are no county seminaries left in the State), then in the County Court for the benefit of the common schools of the county.

SEC. 137. DEPENDENT CHURCHES. Before treating of disputes in a church or congregation, we must notice the broad distinction between those religious bodies whose government is congregational, and those in which the local society submits itself to the direction of a higher and more extended authority. Among the former there are in Kentucky the Baptists, the "Christians" (commonly known as Campbellites), the Unitarians, and the Jews; among the latter the Roman Catholics, the Episcopalians, the Methodists, and the Presbyterians. The

⁶ *Alexander v. Slavens*, 7 B. M. 351.

⁸ *E. g.*, *Harper v. Straws*, Sec. 137,

⁷ *Littell v. Wallace*, 80 Ky. 252.

n. 11.

principles which govern in disputes over church property are different when the religious society belongs to the one, or when it belongs to the other class. The provisions of the statute designed to allay disputes are not applicable to those churches which are dependent upon a higher and more comprehensive body.

The Roman Catholic Bishop of Louisville was incorporated as a corporation sole in 1844;¹ and all the church property in his diocese, except such as belongs to religious orders, is held in the name of the Bishop and his successors. No disputes have arisen among the Roman Catholics of Kentucky, and but few in the Protestant Episcopal Church.²

In 1844 the Methodist Episcopal Church of the United States divided itself voluntarily into a Northern Church (retaining the old name) and a Southern General Conference, or "M. E. Church, South," and authorized the conferences and single societies along the border to choose their new connection. The deeds for Methodist church property, drawn in accordance to the old discipline, subject each church to the laws of the "Methodist Episcopal Church of the United States" as adopted at their General Conference. It was held that the act of peaceful separation was within the power of the General Conference, that thereafter the old church no longer existed, and that the minority in any society on the border adhering to the Northern Church, while the majority had connected itself under the act of separation with the Church South, lost all right to the house of worship.³ In fact, where the trusts of the deed subordinate the worshiping society to a

¹Sess. Acts, 1844, p. 225; hidden in "An act to incorporate the Christian Church at Midway, and *for other purposes*," the rule against multifarious acts being yet unknown.

²An Episcopal congregation which went into the "Reformed Episcopal Church" had to give up its church property, though paid for with the money of those changing the connection, to those who staid in the old

fold. (*Merriwether v. Pettet*, MS. O., 1878. See also n. 13.)

³*Gibson v. Armstrong*, 7 B. M. 481. It was said in a later case (*Humphreys v. Burnside*, 4 Bush, 225), that the division of the Methodist Church into a Northern and Southern branch "was a part of the history of the country" (a favorite phrase with Kentucky judges) of which the court might take judicial notice.

more comprehensive parent body, those who dis sever their communion with that body, even if they should comprise the whole of the local society, lose all interest in the church property.⁴ A resolution of the General Conference of the M. E. Church, South, in 1865, "that whenever entire churches have voluntarily left us and united with the African M. E. Church, the trustees are *advised* to *allow* them the use of the house for worship, etc.," does not change the trusts impressed upon any churches of that denomination dedicated to the use of colored members; especially after the General Conference in 1870 disclaimed the power to abdicate its trust; hence, the members of a local colored body who adhere to the M. E. Church, South, are entitled to the use of a house of worship dedicated to it in preference to those who adhere to the African M. E. Church.⁵

But in a not much earlier case between substantially the same parties, and over the same church edifice, the same court (Judge Cofér) held, that the abandonment of the local body by the authorities of the parent church justified the members in joining the African Church, and that, though they might be seceders, the plaintiffs (trustees appointed by the white society in the same town) had no standing in court; that as trustees they represented no beneficiaries, as there were no colored members of the M. E. Church, South, wishing to use the house of worship, and it would therefore be wanton injustice to exclude the "Africans."⁶ It seems that colored members were afterward organized into a body, on whose behalf the later successful suit was brought.

The Presbyterian Churches in the United States are, as much as those of the Methodists, subordinated to a general body, the "General Assembly." The separation in this church between those of the North and the greater part of the congregations and synods in the States of Kentucky, Missouri, etc., took place after the war, not by agreement, but by the excision of those who joined in the "Declaration and Testimony" of 1865. Upon the principles stated above, those adhering to

⁴ Lewis v. Watson, 4 Bush, 228.

⁵ Brown v. Monroe, 80 Ky. 443.

⁶ Newman v. Proctor, 10 Bush,

318.

the "General Assembly" would have been entitled to the sole possession of the lots and buildings dedicated to the Presbyterian Church. But a majority of the court, drawn on party lines, undertook to review the action of the General Assembly in its "deliverances" made in 1864 and 1865 on loyalty and on slavery; and though admitting that, generally speaking, the civil courts must take the decisions of ecclesiastic tribunals and governing bodies as final on all matters of church government, said they might review these decisions where such a tribunal or body undertakes to meddle in questions of State. It was held that these "deliverances" were beyond the power of the General Assembly, and those of the members in the local body who left the connection in order to join the seceding Southern Church were justified in doing so, and were given an equal share in the use of the house of worship.⁷

Two years before this the court divided in like manner over another Presbyterian Church dispute. The appellees having been kept from taking their seats as ruling elders by other elders who had the support of the trustees in the use of the property, applied to the Synod and to the General Assembly to be installed, and these bodies ruled in their favor. A suit brought by them to carry out these rulings was sustained by the Chancellor at Louisville. But the Court of Appeals reversed his decree, three of the judges holding that they had the right to read the Constitution of the Church for themselves, and that according to their reading the Synod and General Assembly had in judicial matters only an appellate, not an original jurisdiction: that their attempt to usurp the latter made their actions void, and left the appellees without any support for their claim to the eldership.⁸ In another controversy arising in a Presbyterian congregation, the deed conveying the church lot declared a trust "for the benefit of the Presbyterian Church sect and congregation of Christians at Louisville," and said nothing about any connection. But the

⁷ Gartin v. Penick, 5 Bush, 110.

⁸ Watson v. Avery, 2 Bush, 336; the doctrine of the two last cases was rejected by the S. C. U. S. in Watson

v. Jones, 18 Wall. 679. Both State and Federal courts were divided on party lines.

court held, that in the nature of things a congregation could not be Presbyterian without belonging to a Presbytery, and through it to a synod or assembly, and that the party in the local body which defied and no longer acknowledged these higher authorities thereby lost its identity as the "First Presbyterian Church at Louisville," and therewith all right to the property held under the old deed. Even a lot used for a chapel under a deed for the "use of said First Presbyterian Church congregation, whose pastor is W., etc., *and the regular succession* of said corporation, irrespective of their presbyterial, synodical, or assembly relations" was, notwithstanding these plain words of reservation, given to the minority which remained faithful to the Presbytery, because it alone constituted the "regular succession" of the First Church.⁹ And thus a Methodist parsonage, the deed for which conveyed it to certain members without any declaration of trust whatever, was taken from them when they with a majority of their fellow members left the connection, on the ground that it must go along with the other church property held under the ordinary Methodist deed of trust.¹⁰

The case was distinguished from a case decided in 1853, the only one in which those who left their "connection" were allowed to retain the church property. The deed was to trustees "for the use and benefit of the religious Methodist society of the African race now worshiping, or which may worship in said church, now called Asbury Chapel," and the society was then in connection with the M. E. Church, South. The whole society and their pastor afterward withdrew from it and joined the African M. E. Church *unanimously*. It was held, that considering the language of the deed the society had the right to change its external relations, and that those who adhered to the new connection, thus unanimously chosen, were the identical society provided for in the deed, and those

⁹ First Presbyterian Church v. Wilson, 14 Bush, 252.

¹⁰ McKinney v. Griggs, 4 Bush, 407; Judge Williams in a dissenting opinion points to the testimony in

the record as showing that the omission of any trust was purposed, so that the local body might retain the control of the lot.

who attempted a return to the M. E. Church, South, having to reorganize for that purpose, were not the old society, and that it was needless to inquire into the respective numbers of the parties.¹¹

Notwithstanding the strong southern leaning of the judges, the control of Center College at Danville was adjudged to the Synod of Kentucky Presbyterians, which adhered to the old (now Northern) General Assembly, under a contract made in 1824 between the Trustees of the College and the Synod of Kentucky, to this effect: "The board may fill vacancies as before . . . subject to revision by the Synod, etc. And to prevent doubts about the body called the Synod of Kentucky, who shall be thus electors of trustees, it is understood that it shall be the body . . . in connection with the General Assembly of the United States of America, who meet annually as a Synod in the State of Kentucky . . . and as such are capable of being identified."¹²

In a late case, not involving church property, but the construction of a contract between a Protestant Episcopal parish and its rector, the Court of Appeals finds that a "board of reference" selected under a canon of the Church has determined the dispute between the parties. It claims the right to examine the powers of this board, but deems them sufficient, though the canon establishing such boards was adopted after the rector and parish had entered upon their contract.¹³

SEC. 138. INDEPENDENT CHURCHES. The chapter of the General Statutes on Charitable Uses and Religious Societies, with the exception of its first and second section, is taken mainly from an act of 1814.¹ Such a society may appoint

¹¹ Harper v. Straws, 14 B. M. 48.

¹² Kinkead v. McKee, 9 Bush, 539.

¹³ Perry v. Wheeler, 12 Bush, 541. Judge Lindsay, in delivering the opinion of the court, protests very strongly against the doctrine of the S. C. U. S. in Watson v. Jones, insisting that it is the duty of the U. S. courts to follow the decision of the State courts as to the rules of prop-

erty, especially of landed property within the State.

¹ (M. and B. Stat., II, 1347); Gen. Stat., Ch. 18, Sec. 8. It was strongly intimated before the revised statute restored survivorship among joint trustees, that its abolition in 1796 did not extend to trustees under this act, or church trustees generally any more than to trustees of towns. (Cahill v. Bigger, 2 B. M. 211.)

not exceeding three trustees (it was five in the original act), in whose name the property is to be held, and who have the power to sue or defend suits affecting the same.

“ In case a schism or division shall take place in a society, the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportionate to the members of each party. The excommunication of one party by the other shall not impair such right, except it be done *bona fide*, on the grounds of immorality.”² These rules do not govern societies, as we have seen, whose property is dedicated to such uses, as a distant higher authority, a conference, assembly, bishop, or council may prescribe.

A dispute arose in a Baptist society, and the minority claimed to be the true body, because it agreed with the “ United Baptists ” of Kentucky, and was recognized by their Association. But such an association is not a governing body like a council, conference, or synod in the Episcopal, Methodist, or Presbyterian Church. Hence no weight was given to such recognition ; and as the minority party had broken loose from the local body it was not entitled to any share in the property, but was allowed a lien for the value of repairs made thereon during its occupancy.³

The parts of the act of 1814, looking to a division of time between contending parties, have been frittered away by construction. They are said not to apply where the original trustees appointed by the deed or will of the donor are still holding the title,⁴ and only where trustees were appointed under and with a view to that act, and perhaps only as against the trustees, not against the majority acting through other channels.⁵ Under the present law there must be three (or fewer) trustees appointed by the society, who hold the title before these rules will apply. Even in the one case in which the court grudgingly approved a division of time, the rights of the minority or outgoing party were put on a very narrow

² Gen. Stat., Ch. 13, Sec. 3, subsecs. 4, 5. The old act required the appointment of trustees to be recorded in the County Court.

³ Hadden v. Chorn, 8 B. Mon. 70.

⁴ Shannon v. Frost, 3 B. M. 253.

⁵ Berryman v. Reese, 11 B. M. 287; Hadden v. Chorn, *ubi supra*.

footing. It seems to have no standing in court as complainant, but can only defend when the majority or the trustees invoke the civil power.⁶ Still they must have some way to keep the trustees from "expelling them," or the statute would become a nullity. But that the seceders have taken a new name, such as "Christians" instead of "Baptists," is immaterial, just as the whole local body does not lose its identity by changing its name from the "Particular Baptist" to the "United Baptist" Church.⁷

The power of a (congregational) church at a regular meeting to expel a minority of its members for what seems to the majority a breach of the religious bond, or for immorality, and thereby to deprive them of all their further rights, has been recognized as a common law right, notwithstanding the statute; and in the same case it was held that where a number of persons, as an organized society, obtain by contract rights in a church, they lose such rights by disbanding, and do not regain them by forming themselves again into a new body.⁸

⁶ *Curd v. Wallace*, 7 Dana, 190. The seceding minority was to have "time" only in proportion to the number of members which it took out of the parent body.

⁷ *Ibid.*; *Cahill v. Bigger*, 8 B. M. 211; see *contra*, *Berryman v. Reese*, *supra*.

⁸ *Berryman v. Reese*, *supra*.

CHAPTER XXII.

MISTAKE, FRAUD, AND ABUSE OF TRUST.

SEC. 139. Mistake of Law and Fact.

SEC. 140. Abuse of Position of Trust.

SEC. 141. Reforming Instruments.

SECTION 139. MISTAKE OF LAW AND FACT. Among the rights of property may be reckoned that of recovering back any thing of value with which the owner has parted through mistake of law or fact, or through the fraud of him who obtained it. The Kentucky courts have gone further in the recognition of this right than those of England or of almost any American State, by setting aside the time-honored distinction between mistakes of law and mistakes of fact, and rejecting the well-known maxim of the civil law: *Ignorantia juris nocet*.¹ In an early case, a man instructed his own lawyer to figure up how much he owed to another because certain notes assigned by him had not been paid; his lawyer worked the sum on wrong principles of law, making the result too large; the client paid the sum through his lawyer in money and new notes, the creditor being guilty of no fraud and doing nothing to bring about the erroneous result. The court relieved him, nevertheless, and said: "It has been settled by this court that even for mistakes in law relief may be granted in some cases."²

¹ This departure has already been mentioned in dealing with the recovery back of taxes unlawfully collected (see *supra*, Sec. 4), and the cases under that head will not be quoted here.

² *Fitzgerald v. Peck*, 4 Litt. 125. But where one, who is and knows himself to be morally liable for

something, mistakenly believes himself to be also bound at law, and executes his covenant under such belief, he will not be relieved. (*Cardwell's adm'r v. Strother*, Litt. S. C. 429.) The authorities by which the doctrines in the text were "settled" are not to be found in the reports.

Judge Robertson fully discussed the question of mistake of law in 1836, in the light of the modern civil law writers and of the English and New York authorities. The complainant had made an arrangement with his sister's daughter by which he gave her husband certain land, money, and notes for the supposed rights descended on her from her father; he, knowing the facts, but drawing from the facts mistaken conclusions of law, gave her husband much more than she was entitled to. Aside of other grounds of relief, in a suit against the daughter's husband, the court affirmed its right to relieve against mistake of law, and to set aside an alleged compromise (though among relatives) that was based upon it, quoting Lord Eldon for the position that a compromise may be set aside for an *obvious* mistake of *plain* law.³

Where money has already been paid, it is said that the mistake justifying a suit to have it refunded must be more palpable than where an effort is made to enforce a contract growing out of mistake. But where an indorser paid to the holder the contents of a bill of exchange on which the demand of payment had not been made for eleven days after maturity, not knowing that the law released him, it was thought palpable enough, and the holder was adjudged to refund, though it should be said that the judgment was also based on the plaintiff's ignorance of facts, which would, if known to him, have wholly justified him in withholding payment.⁴ And where a railroad company has paid dividends not really earned, under a mistaken construction of their charter, such dividends may be recovered back, and the right to so recover them back may be garnisheed by its judgment creditors.⁵ Where a judgment was recovered for an injury to the person, which then by law did not draw interest, but the defendant (a railroad company) paid interest from inadvertence or want of legal knowledge, the recipient was made to refund it.⁶

In a late case a mistake of law, on so doubtful a point of

³Underwood v. Brockman, 4 Dana, M. 510.
309, 819. It is quoted as the leading
case for the Kentucky doctrine.

⁵Gratz v. Redd, 4 B. M. 178, 190.

⁶McMurtry v. Ky. Cent. R. R. Co.

⁴Ray v. Bank of Kentucky, 3 B. 84 Ky. 462.

law that the Court of Appeals could only establish it *thereafter* by a reversal of the lower court, was induced by a suggestion from the counsel on the opposite side, who, considering the uncertainty as to the true meaning of the clause, must have acted in good faith; yet this mistake was, together with want of consideration, deemed sufficient to set aside a family compromise.⁷

Although a statute (General Statutes, Ch. 39, Art. II, Sec. 42) expressly allows a personal representative, who by *mistake* as to the solvency of an estate overpays a creditor, or pays a legatee or distributee, to recover back the amount thus paid; still where such a payment was made to a creditor having sureties or indorsers for his demand, and the mistake was not discovered for nearly five years, so that the sureties could no longer be reached, a suit then brought to make the creditor refund the amount received was disallowed.⁸

The distinction made in the Civil Law, that ignorance of law excuses only one who has no access to the advice of those learned in jurisprudence, seems, according to cases on this head, not to have struck the courts of Kentucky with much force. It is hardly hinted at, and the case first quoted is directly against it.

SEC. 140. ABUSE OF POSITION OF TRUST. The Kentucky courts have carried out fully the doctrine of equity, that one in a fiduciary relation can not make profit to the loss of those who have confided in him, or whose interests have been put in his keeping, and that the latter may at their option look upon the former as still a trustee after he has at law acquired, or has transferred to others for his own benefit, the absolute title to trust property. Thus, an executor who had bought at a very low price—less than the debt—land mortgaged to his testator, was made to account to the legatees for the full amount of the mortgage debt, but was not, when ready to do that, forced to give up the land which was of greater value,

⁷ Kraft's guardian v. Koenig, 8 Ky. Law Rep. 870. It was the construction of a devise to "my wife and our daughter" (see case between the same

parties in Sec. 86, I.)

⁸ Brooking v. Farmers Bank, 83 Ky. 431.

as his duty to the estate was done when he collected the demand in full, and equity does not undertake to punish trustees.¹ But the Kentucky Court of Appeals has very boldly and justly applied the law of trusts to the trusteeship of railroad directors, and has set its seal of condemnation on the too common practice of railroad wrecking.

In 1858 R. B. Bowler, being the most influential among the directors of the Covington & Lexington Railroad Company, managed its business, purposely, as the court found, in such a manner as to precipitate, by the default on interest coupons, a suit by the holders of the second mortgage bonds, while he bought up the income and third mortgage bonds at a low price. Judgment was rendered for the sale of the road, and he became the purchaser. A joint stock company was afterward organized, in which his widow and children were the main stockholders. The old company organized a new directory for the purpose of recovering the road from those claiming under Bowler's purchase. The suit was based on the ground that Bowler became, when his purchase was confirmed, a trustee of the property for the corporation whose interests he betrayed; it was dismissed by the court below, but was sustained by the unanimous judgment of the higher court, Judge Lindsay delivering a strong and exhaustive opinion.² A number of points, which would naturally come up in a similar suit, were decided.

1. The limitation is not that of fifteen years, which governs in actions for the recovery of land, but five years, which are allowed for enforcing an implied or constructive trust; and the bar runs from the time when the purchaser disclaims holding as trustee; in this case from the time at which he refused the demand of a meeting of stockholders to allow them to redeem. The time was extended for one year after the appointment of Bowler's personal representative, he having died within the five years, in accordance with the saving clause in the statute, as he was a necessary party in the accounting.³

¹ Longest's adm'r v. Tyler's ex'rs, 1 Duv. 192. Many similar cases are found in the reports, but they present nothing peculiar to the jurispru-

dence of Kentucky.

² Covington & Lexington R. R. Co. v. Bowler's heirs, 9 Bush, 468.

³ *Ibid.* 483-485.

2. Mere delay in bringing the suit does not show an abandonment of the claim. In this case the troubles growing out of the civil war went far to excuse the delay. But unless abandonment of the claim or acquiescence were shown, no lapse of time less than the statutory bar would defeat the trust.⁴

3. This is not a suit to vacate the old decree of sale, or the old judgment confirming the sale, hence it need not be brought in the same court which adjudged or confirmed the sale. Hence, also, matters decided in that case can not be rejudged. For this reason the court could not lessen the judgment which Bowler had recovered on the income and third mortgage bonds, bought up by him for less than their par value, to the sum at which he had bought them.⁵

4. The unsuccessful attempt of some of the stockholders to prevent a confirmation of the sale does not estop the company when reorganized from seeking to establish the trust in its favor, though their exceptions were made substantially on the same grounds as the subsequent suit.⁶

5. The relief was finally given in the shape of leave to redeem within a time certain, with the alternative of strict foreclosure; that is, after an account of payments, interest, earnings, expenses, and taxes were stated, the old company was to have a year in which to pay the defendants, with accruing interest, and unless it should do so its bill would be dismissed.⁷

6. Men who were directors in the company, and as such knew of the dispute between the purchaser and the body of the stockholders, can not, when they buy into the new company, claim protection as purchasers in good faith.⁸

The trusteeship here thrown on Bowler differs greatly from that treated heretofore,⁹ where professed friends of the defendant had bid in his property at a judicial sale, holding out the hope to him or to his friends that they would allow a redemption; the trust was here implied from the duties of a

⁴ *Ibid.* 492, etc.

⁵ *Ibid.* 507, 509.

⁶ *Ibid.* 482.

⁷ *Ibid.* 497.

⁸ *Ibid.* 495. Here, moreover, the

deed from Bowler to trustees for the new company alluded to the risk of losing the property through an outstanding equity.

⁹ See *supra*, Sec. 72 (near end).

director, for at the time of the sale Bowler had entirely cast off the mask of caring for the welfare of his old constituents.

And where directors issue bonds of a corporation to themselves, and then sell them at a profit; they must account to the corporation for the profit received; and this, though the figure at which the bonds were issued to them had been arranged before they became directors between them and the then principal stockholders.¹⁰

But it does not follow that directors can never buy the property of a defunct corporation at a chancery sale, where they have done nothing to bring about the insolvency, or the resulting enforcement of mortgages or liens.¹¹

SEC. 141. REFORMING INSTRUMENTS. In late years the Court of Appeals has gone pretty far in reforming instruments on account of mistake, and enforcing them as reformed, setting aside for that purpose not only the Statute of Frauds, but the laws which for the protection of a married woman require her deed to be read and explained to her before acknowledgment. A married woman had mortgaged a tract of land; by the mistake of the draftsman it was wholly misdescribed, the exclusion in the deed conveying land to her being written out into the mortgage as the thing granted instead of the larger tract less the exclusion. The mortgage being put in suit, and the mistake being alleged and proved, the court overruled her plea that the clerk read and explained to her only the mortgage naming the wrong tract, and not the reformed instrument which the court proceeded to enforce.¹

But the most thorough discussion on the power of the Chancellor to reform and then enforce instruments is found in a case already quoted, *Worley v. Tuggle*.² Judge Robertson, the ablest judge on the bench, and the one otherwise most inclined to upset the security of written muniments by proof of spoken words, dissented from the majority of the

¹⁰ *Widrig & Co. v. Newport Street Railway Co.*, 82 Ky. 511.

¹¹ *McMurtry v. Montgomery M. T. Co.*, 86 Ky. 206, 213.

¹ *Tichenor v. Yankee*, 11 Ky. Law

Rep. 712. Ch. 81, Sec. 17, Gen. Stat., sets aside *Ford v. Teal*, 7 Bush, 156.

² Rep'd 4 Bush, 168; see Sec. 92, n. 8. The mistake relied on here must have been mainly a mistake of law.

court and refused to reform a deed in which no lien was reserved, upon proof that the reservation of such a lien was intended, and then to enforce that lien against volunteers for whom another had bought the land. In his dissenting opinion he shows by the weight of both English and American precedents that in the case of an executory agreement, first to reform, and then to decree an execution of it, would be virtually to repeal the Statute of Frauds, quoting the opinion of Baron Alderson in *Attorney General v. Sitwell* (Young and Coll. 559), and that "mistake" (according to Sugden on Vendors) "can only be used as a defense to a bill demanding a specific performance." And he quotes one Kentucky case³ which indicates that oral evidence may be used to resist, but not to obtain a specific enforcement of a contract within the Statute of Frauds; and another case where the court says that "he (the obligee) can not in the attitude of complainant compel a specific execution of the contract varied by parol evidence, nor otherwise than according to the written memorial of the sale."⁴ From a third case he quotes: "To grant him relief on such agreement would be directly contrary to the letter as well as the spirit of the statute against frauds and perjuries."⁵ The doctrine of the majority is the more dangerous, as the Code of Practice does away with the old rule in chancery under which the testimony of two witnesses, or of one witness and strong corroborative circumstances, are needed to overcome the denials in the defendant's answer.

The position here taken was not well received, and as Judge Williams rests the opinion of the majority on "the developing science of the law, and its ever waxing love of justice, increasing the omnipotence of the Chancellor for equitable purposes" rather than on precedents, it was thought that the new doctrine would soon be abandoned. But it has, aside of the case quoted at the beginning of this section, been proclaimed as the settled law in the State in a fully considered opinion, where, upon a verbal understanding that the owner of

³ *Smith v. Smith*, 4 Bibb, 81.

Hanly v. Shrieve, 1 Dana, 1.

⁴ *Harrison v. Talbot*, 2 Dana, 268,
and quotes as being of the same effect,

⁵ *Churchill v. Rogers*, 3 Mon. 81.

several lots would sell those which had a certain building on it, a deed was written naming lots 8 and 9, and the weight of evidence showed that the buildings had been on lots 6, 7, and 8, the parties claiming under the deed sought to reform it in accordance with the oral understanding; it was objected, that to *include* a lot not named in the deed, upon oral proof, was to set aside the Statute of Frauds; but on the authority of *Worley v. Tuggle* the deed was reformed.⁶ But where a widow took an insurance policy in her own name alone in a building belonging mainly to her children, paying premium on the full value, she was not allowed to so reform it as to embrace the interest of the children, and was confined in her recovery to her dower and a lien for payments of purchase money, as she could not show what interest of the children was meant to be insured.⁷

The reformation of family settlements which by mistake are made to the grantor's or buyer's wife and children, when the wife alone was meant, or to a greater or smaller number of children than intended, has been adjudged repeatedly without a doubt as to the Chancellor's power to grant such relief being raised.⁸ Much injustice may have been done to infants, not able to bring countervailing proof, where their parents choose to resume a gift on the assertion of mistake.

NOTE TO CHAPTER XXII.—Of rescission as one of the remedies for *Fraud* or *Mistake* we have treated under such heads as Executory Contracts for Lands, Sale of Bad Titles, Surplus and Deficit, and will come to it again under the head of the Assignment of Notes. Except where the fraud or mistake occurs in the title or quantity of land, the law for rescission in Kentucky can hardly be said to differ from that of other States. For a case for rescinding a lease, because the lessee became unable to comply with its terms, see *Kentucky River Navigation Company v. Commonwealth*, 13 Bush, 435.

NOTE TO THIRD BOOK.—The law of Kentucky on Trusts and Equitable Titles has been treated on a number of topics on which it diverges from the general trend of American law, in the belief that on other subjects it agrees with the law of those States which have adopted equity jurisprudence from the beginning and in its entirety. Thus the doctrine of Equitable Conversion is fully recognized. The duties of trustees in making investments have been regulated by statute, in connection with those of guardians, and will be referred to under that head.

⁶ *Noel's ex'r v. Gill*, 84 Ky. 241.
See also *McMillin v. McMillin*, 7
Mon. 560, 565.

⁷ *Hartford Ins. Co. v. Haas*, 87 Ky.
531.

⁸ *Smoot v. Boyd*, 87 Ky. 642.

BOOK FOURTH.

PERSONS AND THEIR OBLIGATIONS.

CHAPTER XXIII.

MARRIAGE AND DIVORCE.

SEC. 142. How Marriage is Contracted.

SEC. 143. When a Divorce is Granted.

SEC. 144. Alimony and Costs.

SECTION 142. HOW MARRIAGE IS CONTRACTED. Before the Revised Statutes came into force in 1852, the common law of Kentucky recognized a marriage "by cohabitation and reputation;" and such is now the law as to marriages supposed to have thus begun before July 1, 1852. "Until then," says Judge Robertson,¹ "cohabitation and recognition as husband and wife by a free male and female, whether black or white, who were competent to make a binding contract, was a legal marriage." From a clause of the Revised Statutes² he quotes further in his opinion that thereafter all marriages shall be *void* "when not solemnized or contracted in the presence of

¹ Estill v. Rogers, 1 Bush, 62 (1866). But the parties in this case were slaves in 1852, hence not competent to make such a contract.

² Ch. 47, Art. I., Sec. 2, subd. 4; now, Gen. Stat., Ch. 52, same Art., Sec. and subdivision. The persons who may solemnize a marriage are set forth in Section 8, thus: (1) Ministers, etc., of any denomination in

regular communion with any religious society; (2) County Court judges and such justices of the peace as the County Court may authorize; (3) provides for Quakers being married before their society, a clause copied from some eastern statute, but perhaps never put in use in Kentucky.

an authorized person or society." We have had occasion, in connection with the Homestead Law, to refer to the act of February 14, 1866,³ which was passed for the benefit of the slaves who had been freed a few weeks before by the Thirteenth Amendment. They were empowered to legalize a former cohabitation as husband and wife by declaring before the county clerk "that they have been *and desire to continue* living together as husband and wife." Such a declaration was evidently intended to work retroactively, so as to render former issue legitimate,⁴ and for many other purposes.

Ministers of religion who desire to solemnize marriages must first obtain authority from the County Court of the county in which they reside;⁵ but "no marriage solemnized before any person professing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or *either of them*, that he had authority, and that they have been lawfully married."⁶

A marriage is moreover void if incestuous, the forbidden degrees reaching to nieces and grand-nieces, nephews and grand-nephews, step-father and step-mother, and the mother or grandmother of the wife, and father and grandfather of the husband. When a marriage is dissolved for nullity, relationship can no longer rest on it. A marriage is also void with an idiot or lunatic; between a white person and a negro or mulatto (less than one eighth of negro blood not being considered); where either party has a husband or wife living from whom such party is not divorced, and where at the time of marriage the male is under fourteen, or the female under twelve years of age.⁷

Two residents of Kentucky in 1830 went to Tennessee to have their wedding ceremony performed, because at that time the law of Tennessee allowed, while that of Kentucky forbade

³ Myers' Suppl., p. . . .

⁴ See *supra*, Sec. 58.

⁵ Gen. Stat., Ch. 52, Art. II, Sec. 9.

⁶ *Ibid.*, Sec. 7, enforced in Robinson v. Commonwealth, 6 Bush, . . where the husband's conviction of bigamy

was held good, though the ministers who solemnized the first and second marriage had no authority from the County Court under Section 9 of the statute.

⁷ *Ibid.*, Sec. 1; Sec. 2 (1, 2, 3, 5).

their union, the woman being the widow of the man's uncle. It was held that the marriage was valid;⁸ and the Revised and General Statutes declare that if persons resident in this Commonwealth should marry in another *State*, such marriage, if valid there, shall be valid here;⁹ it being understood that no State of the Union would sanction a marriage which is incestuous by the law of nature. It was held in the same case, that for those grounds of incest, which are not so by the law of nature, the marriage can not be declared null after one of the parties is dead; but at present the law says, generally,¹⁰ that the issue of an incestuous marriage is legitimate, unless it be found such by the conviction or judgment of a court in the lifetime of the *parties*; but this would not prevent the denial of dower or curtesy after the death of one, or of distribution after the death of both of them. A marriage may be set aside by a court of equity for force and fraud;¹¹ and (under the same section) at the instance of a next friend where a boy under sixteen years or a girl under fourteen have married without parental consent, and have not ratified their union after arriving at those ages.

The failure to take out a license does not affect the validity of the marriage,¹² though the minister may be fined for acting without the license, or the county clerk for issuing it without proper grounds. A court of equity may also by its judgment confirm the validity of a marriage when either party, feeling doubts, asks for a declaration of its validity.¹³

SEC. 143. WHEN A DIVORCE IS GRANTED. The grounds of divorce have in Kentucky as elsewhere been gradually multiplied and made more easy. They are of two kinds: those of which either party may avail itself, though not without fault, and those upon which only the party not in fault can base his or her complaint. Of the former there are but

⁸ *Stevenson v. Gray*, 17 B. M. 193.

⁹ Gen. Stat., Ch. 52, Art. I, Sec. 6.

¹⁰ *Ibid.*, Sec. 3. (See *supra*, Sec. 58.)

¹¹ *Ibid.*, Sec. 5 (same Sec. in Rev. Stat.). Enforced in *Bassett v. Bassett*, 9 Bush, 696. The apparent husband can not testify against his wife

in a suit for annulment, being considered still a husband till the sentence of nullity is pronounced.

¹² *Cannon v. Alsbury*, 1 A. K. Mar. 76.

¹³ *Ibid.*, Sec. 20.

two grounds, the first being "impotency or malformation," the other, "living apart without any cohabitation for five consecutive years next before the application."¹

It has been held by the Circuit and other equity courts throughout the State that this ground will not hold good where either party is insane. The short-lived acts which have been passed from time to time to allow divorces from insane spouses are the best proof that the general law was deemed herein to be deficient, and the decision in a case brought under one of these acts impliedly recognizes this view.² And as the statute gives all the grounds of divorce by saying that courts *may* grant it, some equity judges have (we think improperly) claimed a discretion in refusing a divorce on five years' separation when they deemed the party complaining to be at fault. The Court of Appeals has not passed on the question, but it seems to the writer that *may* here means *shall*, and that the court can hardly have a choice but to grant the divorce where the couple has been separated for five years.

The party not in fault may have a divorce for "abandonment by one party of the other for one year."³ The language of the Revised Statutes was fuller, adding the words "or like separation." But even that clause was strictly construed in this, that where a separation in Kentucky was alleged, it was thought that the beginning of the separation must have taken place here, hence the parties must have cohabited in the State; and where the husband had abandoned his wife in another State, but subsequently met her in Kentucky, and parted from her after a short interview in the presence of others, in which he declared his unwillingness to be reconciled, it was not deemed a separation or abandonment in this State.⁴ It has been held that a petition for divorce must contain the averment that the defendant separated from the plaintiff without the latter's fault, and there must be some proof to that effect;

¹ Gen. Stat., Ch. 52, Art. III, Sec. 1 (first) 2.

² *Newcomb's ex'r v. Newcomb*, 18 Bush, 544.

³ Gen. Stat., *ibid.*, Sec. 1 (second) 1.

⁴ *Beckett v. Beckett*, 17 B. M. 370,

and where a husband living in New York sends his wife to Kentucky and fails to follow her, it is not abandonment here. (*Hick v. Hick*, 5 Bush, 670.)

but we are not further told what would be such fault, except by way of illustration; if the husband should "render it impossible for her to live in peace and safety." Should the plaintiff have consented to the defendant's departure from the common home, such departure could hardly be called an abandonment.

The next ground is "living in adultery with another man or woman." A single act of adultery is not "living in adultery," and, if committed by the husband, does not entitle the wife to a divorce.

Next follow "condemnation for felony, in or out of the State," where felony means evidently a crime punished by death or imprisonment at hard labor in some State prison or penitentiary; then "concealment from the other party of any loathsome disease existing at the time of marriage, or contracting such afterward; force, duress, or fraud in obtaining the marriage (where the decree of divorce or a sentence of nullity may be had at the option of the plaintiff), uniting with any religious society whose creed and rules . . . forbid husband and wife from cohabiting."⁵

The wife, when not in *like* fault, may have a divorce for the following causes:

1. Confirmed habits of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for the maintenance of his wife and children. Where the husband has no estate except his "physical and mental faculties," his failure to work for a living is deemed "a wasting of his estate" within the meaning of the law.⁶

2. Habitually behaving toward her by the husband, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace and happiness.

3. Such cruel beating or injury, or attempt at injury, of the wife by the husband as indicates an outrageous temper in

⁵ Gen. Stat., same section as above.

fense, that the husband's father helps to support the family.

⁶ McKay v. McKay, 18 B. M. 8; Shuck v. Shuck, 7 Bush, 306; no de-

him, or probable danger to her life or great bodily injury from her remaining with him.

These grounds are copied literally from the Revised Statutes. The earlier law contemplated a higher degree of cruelty, and the decisions under it are no longer applicable. It is, however, generally understood that a single blow is not in itself and in all cases a ground for divorce. In the only case construing these grounds it was said: "Language that may pain a sensitive woman, or the manners of a husband that may appear rough and vulgar in contrast with those educated in the refinements of social life, constitute no ground for divorce."⁷

It seems to us that, as under the Civil Law, the refinement of the wife should be taken into consideration; for, what in the words of the statute would "destroy the peace and happiness" of a refined lady, would pass unnoticed over the head of an uneducated woman.

The husband may have a divorce for the following causes:

1. Where the wife is pregnant by another man without the husband's knowledge at the time of the marriage.

2. Adultery by the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of an act of adultery.

3. When not in like fault, for habitual drunkenness on the part of the wife of not less than one year's duration.⁸

The grounds must in all cases be proved, and that by other witnesses than the parties;⁹ two witnesses, or "one and strong corroborating circumstances," are necessary to prove the charge of adultery or lewdness, and the credibility and good character of these must be known or proved.¹⁰ *Quære*, is the same degree of proof necessary to establish "living in adultery?" All other grounds may be established by one witness, and a

⁷ *Beall v. Beall*, 80 Ky. 677, where the Court of Appeals, though it could not reverse, criticised the decree of divorce with a view of reversing the allowance of alimony.

⁸ This last ground is given by an act of February 4, 1880 (B. and F. Gen. Stat., p. 728).

⁹ Code of Practice, Sec. 606.

¹⁰ Gen. Stat., Ch. 47, Art. III, Sec. 8.

decree dismissing the petition because the ground of divorce is proved by one witness only is erroneous.¹¹

The party seeking the divorce must have had a "residence in the State for one year next before the commencement of the action."¹² The General Statutes¹³ demand that the plaintiff should have been a "continuous resident." A husband had left his home in Kentucky in May, 1880, returned in November, 1883, and stayed three months, without visiting his former home; left, and returned in May, 1885, and stayed again, without visiting his old home, till January 1, 1886; then left the State, and in October of that year brought his suit for divorce on the ground of five years' absence. Without referring to the word "continuous" in the General Statutes, the Court of Appeals construed the "residence" of the Code as meaning an actual, not a legal residence or domicile; and though the plaintiff had always kept up the *animus revertendi*, caused his poll tax to be paid every year, had voted in August, 1885, and had on his last departure told his brother that in a year or two he would return, the court deemed his residence insufficient.¹⁴

But in an old case, not since disapproved, it was said that the wife could not acquire a residence in this State, if her husband had never lived in it, so as to enable her to sue her absent husband for a divorce.¹⁵ The present statute (Section 4) seems no longer to make the husband's domicile the residence of the wife for this purpose, for it says: "Action for divorce must be brought in the county where the wife *usually* resides, if she has an *actual* residence in the State; if not, in the county of the husband's residence." Yet the court doubted strongly whether a wife coming to Kentucky without her husband could acquire the needful residence here, and whether her *habitation* was enough under the statute.¹⁶ It seems clear

¹¹ Stebbins v. Stebbins, 1 Metc. 477.
The ground was abandonment.

¹² Code of Practice, Sec. 423.

¹³ G. S., Ch. 52, Art. III, Sec. 4.

¹⁴ Tipton v. Tipton, 87 Ky. 243.
The same facts, the court said, would

subject the plaintiff to an attachment for non-residence, or to a motion to give bond for costs.

¹⁵ Maguire v. Maguire, 7 Dana, 181.

¹⁶ Hick v. Hick, *ubi supra*.

from the very words of the statute that where both parties reside in the State the wife can, when living apart from her husband, have an actual residence in another county, which would then be the proper county to sue in. But the action is not local so as to render the judgment void if brought in the wrong county; and if the husband or wife, being sued in the wrong county, answers on the merits without objection, the court should proceed to try the case just as it would try an action of debt against a defendant who appears and answers in the Circuit Court of one county, though he resides and is summoned in another.¹⁷

The grounds of divorce must have happened within five years before suit brought, and, unless they take place in Kentucky, there must be sufficient grounds by the laws of the State or county in which they take place: unless at the time the plaintiff has an actual residence in Kentucky. (Section 4.)

Among defenses "recrimination" is recognized by the words of the statute, "the party not in fault;" condonation by more express words.¹⁸

Where the judgment of divorce has been set aside upon joint application, the parties thus re-married can not thereafter have a divorce for "the same or a similar cause."¹⁹ And a party to whom a divorce is granted, and who marries again, can not have a divorce from a second or later spouse, except for impotence, for five years' separation, or for living in adultery.²⁰

"A judgment of divorce authorizes either party to marry

¹⁷ Shuck v. Shuck, *ubi supra*, coming two years later, is quoted by B. and F., p. 729, for the rule that a resident wife can sue a non-resident husband. The printed opinion does not refer to the residence at all. Suits by wives against husbands who have abandoned them and left the State are of almost daily occurrence, and are sustained as of course.

¹⁸ "Cohabitation as man and wife, after a knowledge of the adultery or lewdness complained of, shall take

away the right of divorce therefor."

¹⁹ Same Article, Section 5.

²⁰ *Ibid.*, Sec. 2. This seems the only coherent meaning that can be given to the words of the statute. The party at whose instance the first divorce is granted is put in a worse condition than the defendant against whom it is granted, unless, in view of the equal right of both to marry again at once, the divorce must be understood as being granted to both.

again.”²¹ It can not be appealed from except as to the property rights, or directions concerning custody of children that may be included in it,²² and if pronounced against a defendant constructively summoned it can not be “opened” like other judgments thus obtained;²³ nor can any judgment for divorce be vacated after its term.²⁴

A divorce from bed and board may be granted by a court of equity on the same grounds as a divorce *a vinculo*, or in its *judicial* discretion on other and weaker grounds.²⁵ A determination by the husband without good cause to separate from his wife, and to refuse to provide for her support, is a good ground for her to ask a divorce *a mensa*, and the refusal of the court below is error.²⁶ The applicant for such divorce must have had a continuous residence of one year.²⁷

We have in other sections discussed the effect of a divorce of either kind on marital rights, curtesy, dower, and distribution.

SEC. 144. ALIMONY AND COSTS. While a statute of the year 1800 was in force, allowing the grant of alimony to the wife where the husband had abandoned her for one year, or had lived in open adultery for six months, the Court of Appeals decided in 1823 that the Chancellor had, independently of the statute, and of any agreement between the parties, the inherent power to award alimony, at least where the wife stood in urgent need of his protection.¹ The doctrine seems to have been recognized ten years later, that alimony may be awarded without decreeing a divorce; and it was said that it can not be given for the wife’s lifetime, but must needs come to an end with her coverture.² The Revised and General Statutes do not authorize a suit for alimony, except as an incident of divorce, but the Code of Practice seems to recognize that such a suit

²¹ Same Section.

²² Act of May 5, 1880, Section 2, printed in B. and F. Gen. Stat. p. 394.

²³ Code of Practice, Sec. 414.

²⁴ *Ibid.*, Sec. 344.

²⁵ Gen. Stat., Ch. 52, Art. III, Secs. 6 and 8.

²⁶ *Orr v. Orr*, 8 Bush, 156.

²⁷ *Hulett v. Hulett*, 80 Ky. 364. See same case below, Sec. 144.

¹ *Butler v. Butler*, 4 Litt. 201. The decree for alimony given below was, however, reversed on the merits.

² *Lockridge v. Lockridge*, 3 Dana, 28.

would lie by assigning it to the Chancellor's jurisdiction,³ and the necessity to ask for alimony alone may arise when the wife, not having had a year's continuous residence in the State, is not in a position to ask for a divorce of either kind. And in such a case, in 1882, the wife's petition for alimony alone was sustained.⁴

But alimony and the maintenance of children is mostly asked as an incident to a suit for divorce, either by application during its pendency, or as a part of the final relief.⁵ The right of alimony is given by the statute under the name of "such allowance out of the husband's estate as shall be deemed equitable," which the wife may have "if she have not sufficient estate of her own." This allowance may, in the discretion of the court, be an "allotment" in gross, but not such as will "divest either party of the fee in real estate."

Alimony may be awarded in a suit for nullity, where the wife is blameless; for instance, where she had, in ignorance of the fact, married a man who had another wife living. A wife entitled to alimony, even before it is decreed, stands in the place of a creditor (see Section 124, as to her right of assailing fraudulent conveyances); she may as such sue for money which her husband lost at gaming.⁶

Alimony may be, and, where the husband is old and not able to earn much, it should be limited to a less time than the wife's life, and of course it ceases upon her re-marriage.⁷

Though a decree granting a divorce can not be reversed, yet the Court of Appeals may look into its justice with a

³ Code of Practice, Sec. 423.

⁴ *Hulett v. Hulett*, 80 Ky. 364. Whether a supplemental petition can be filed in the same suit, when the year of residence is completed, setting up grounds for divorce, is left somewhat in doubt by a confused sentence in the opinion, though apparently it is denied.

⁵ Gen. Stat., Ch. 52, Art. III, Secs. 6 and 7. For maintenance pending suit see Code of Practice, Sec. 424. See *supra*, under Marital Rights, for the

effect of a divorce in restoring the parties to their respective properties. (*Strode v. Strode*, 3 Bush, 227.)

⁶ *Cain v. McHarry*, 2 Bush, 263.

⁷ *Strode v. Strode*, *ubi supra*. See also *Green v. Green*, 11 Ky. Law Rep. 715, as to measure of alimony and counsel fees, in view of the husband's means of *earning* money; also two cases in the Superior Court reported in the same volume, *Pearce v. Pearce*, p. 485, and *Shrader v. Shrader*, p. 441.

view to lessen or increase the alimony awarded below.⁸ The court will, in fixing an allowance in the final decree, take into consideration not only the means of the husband, the means and earning capacity of the wife, and the existence or absence of children, but also the conduct of both parties as disclosed by the evidence. The case last referred to, decided in 1883, reviewed nearly all the older cases in which the amount allowed to a divorced wife came up for revision,⁹ saying that "the facts of each particular case will control in determining the amount of allowance." Where the husband alone is at fault, the wife ought upon a separation to have as large a share of his estate as the law would give her upon his death, in the way of dower and distributable share. In one case, after restoring to the divorced wife her own estate, the court added something for her services as a housekeeper, but disclaimed this measurement as degrading, and justified the aggregate (\$1,750) on the ground that it would give the wife (in 1846) a comfortable income, it being understood that she is not to live in idleness. In the principal case an allowance of \$3,500 in gross was reduced to \$2,000, as "ample under the facts" of the case; the former sum being considered as equal to about one third of the husband's estate. Even the ability of the wife's father to assist her was mentioned as a reason for lessening the allowance.¹⁰

"In actions for alimony and divorce the husband shall pay the costs of each party, unless it shall be made to appear in the action the wife is in fault, and has ample estate to pay the same."¹¹ This clause of the statute has been construed to embrace the fees of the wife's lawyer.¹² These must, however, be measured and adjudged in the course of a suit for divorce or alimony by the court, and can not be made the subject of an action of assumpsit by the wife's attorney against the hus-

⁸ Beall v. Beall, 80 Ky. 675.

⁹ Fishli v. Fishli, 2 Litt. 387; Thornberry v. Thornberry, 4 Litt. 251; Thornberry v. Thornberry (other parties) 2 J. J. Mar, 322; Pence v. Pence, 6 B. M. 496.

¹⁰ Beall v. Beall, *ubi supra*.

¹¹ Gen. Stat., Ch. 26, Sec. 28.

¹² Ballard v Caperton, 2 Metc. 412, where the costs and lawyer's fee were enforced in the original suit by rule and attachment.

band for his services in getting the divorce.¹³ But an older case, which is acknowledged as good law, justified such an action where the proceedings had not led to a dissolution of the marriage, provided there were good grounds for the wife to seek the protection of the law, the good faith of the lawyer in believing her story being insufficient.¹⁴ Such an action is based wholly on the common law principle of holding the husband liable for necessities furnished to the wife, and the necessity of the legal services is therefore in issue. Not so under the statute, if an allowance is asked in the court trying the divorce or alimony suit. But the fee must be *reasonable*, and such as would remunerate *one* lawyer; if the wife was served by more than one, they must share such fee among themselves.¹⁵ And when a decree for divorce has once been granted, the wife being discovert, must make her own contract for legal services in any further litigation before the Court of Appeals on custody of children.¹⁶

NOTE—On the custody of children the Kentucky decisions (of which but few are reported) do not differ in their general trend from the modern American doctrine as established in other States.

¹³Williams v. Monroe, 18 B. M. 514.

¹⁴Billing v. Pilcher, 7 B. M. 458.

¹⁵Whitney v. Whitney, 7 Bush, 521.

¹⁶Thomas v. Thomas, 7 Bush, 665;

if there had been a decree on the subject of alimony, and an appeal from it, under an intimation given, it seems the lawyer's fee in the upper court could have been recovered.

CHAPTER XXIV.

NATURAL AND ARTIFICIAL PERSONS.

SEC. 145. Infants.

SEC. 146. Guardian and Ward.

SEC. 147. Idiots and Lunatics.

SEC. 148. Private Corporations—How Created.

SEC. 149. Private Corporations—Stockholders and Directors.

SEC. 150. Private Corporations—Powers, etc.

SECTION 145. INFANTS. Kentucky has not changed the common law standard of full age, either as to males or females, but has, on the contrary, since the Revision of 1852, done away with an old exception to the requirement of twenty-one years; before that time, as at common law, an infant at eighteen could, but can not now make a will of personalty.¹ Though the common law age of consent for entering the married state has not been changed, yet an infant, *unless married before*, can not have a license to marry without consent of the "father or guardian, or if there is none, or he is absent from the State, without the consent of his or her mother, personally given, etc."² Where neither father or mother are alive or within reach, it would seem that an infant (unless it be a widow or widower) can not have a marriage license without having a guardian first appointed to give his consent, and this is often done.

Neither the father nor the guardian of an infant has, ex-

¹ Rev. Stat., Ch. 106, Sec. 3. In a suit against an executor seeking to charge him with negligence for not enforcing a Missouri judgment in favor of his ward, then residing in Kentucky, it was said that, being over eighteen, and therefore over age

under the Missouri law, she could have controlled the Missouri judgment, though still under age by the law of her residence. (*Harris v. Berry*, 82 Ky. 187.)

² Gen. Stat., Ch. 52, Art. 1, Sec. 11.

cept in pursuance of the laws for selling the land of infants for their maintenance, any power to bind the infant's property for his or her board, schooling, or other necessities.³ The power of the infant to bind himself for necessities was in a late case made to cover his promise to pay for bringing up his bastard child. He can be compelled to do so by bastardy proceedings, and "where any person, even if he be an infant, does (promises to do) that which the law requires of him, he is bound."⁴

An innkeeper is bound to receive an infant as well as a grown person as his guest, at least where nothing in his appearance indicates him as a runaway from parents or guardian. Hence he can recover for food and shelter furnished; also for money which he may lend the infant to pay his way home, and for such food, shelter, and traveling expenses he can enforce his innkeeper's lien in like manner as against an adult.⁵

The tendency of the Kentucky cases is to treat the contracts of infants rather as voidable, than as void;⁶ and of a contract to marry, it was said that it is "beneficial," and therefore not void, but a good consideration for another's promise. An infant's note was held not to be void, although under the Kentucky statute it was deemed a sealed instrument or specialty; hence, when he became of age, and being sued in assumpsit for the original demand, he pleaded the giving of the note as a merger. Such plea was deemed a ratification of the note.⁷ A *naked* power of attorney by an infant is void; *secus* if coupled with an interest.⁸ The doctrine that any bargain with an infant by which a gain is made to his loss is constructively fraudulent was applied in 1869 with regard to

³ Cox's guardian v. Shorts, 14 Bush, 125; Gen. Stat., Ch. 113, Sec. 3; but an infant may make a will under a power, and an infant father may name a guardian for his child.

⁴ Stowers v. Hollis, 83 Ky. 544, 550. The infant's liability to bastardy proceedings was declared in Chandler v. Commonwealth, 4 Metc. 66.

⁵ Watson v. Cross, 2 Duv. 147.

⁶ Duvall v. Graves, 7 Bush, 467. ("It might be more wise and consist-

ent to declare no contract void on account of infancy only.")

⁷ Best v. Given, 3 B. M. 72. The case illustrates the unwillingness of the court to allow a fraud to be worked out by the doctrine of merger.

⁸ Pyle v. Cravens, 4 Litt. 18; even where it is executed in the infant's presence (Semple v. Morrison, 7 Monroe); *contra*, Middleton v. Hoge, *infra*, as to power coupled with an interest.

where an infant made a purchase of corn and used it up during infancy; the difference between the value and the price paid by him with interest was adjudged to him.⁹ In cases to which the enlarged Statute of Frauds does not apply; that is, whenever the ratification is used as a defense, and not as the ground for an action, a contract made during infancy may be ratified in Kentucky as elsewhere in many informal ways, or even by long continued lying by without disaffirmance.¹⁰

Hence the action need not be brought upon the ratification as a new promise made after the infant comes of age, but may be brought on the original contract, the ratification being matter for reply.¹¹ An act of ownership, by which an infant is to confirm a purchase of a thing bought, must be unequivocal. Where an infant has bought land and demised it to a tenant while under age, he does not ratify the purchase by simply making no efforts to put the tenant out, while not collecting any rents from him.¹² The right of an infant to set aside, within one year after arriving of age, any judgment or decree obtained against him during infancy is recognized and regulated by the Code of Practice.¹³ An infant married woman is thought to be sufficiently protected by her husband and is excluded from the benefit of the rule; nor does it apply to judgments for torts or for necessities, or such as are rendered upon a set-off or counter-claim against an infant plaintiff; nor does the vacating affect the title of a *bona fide* purchaser under a sale pursuant to the judgment. The infant defendant may apply while still under age; and where a judgment is rendered against several infants jointly, one is not barred because the time has run out against another, and the applicant may in his petition state new facts showing that the decree is unjust.¹⁴

NOTE.—As to estoppel of infant by fraud in misrepresenting his or her age, see Sec. 66, n. 5. For statutes dealing with lands of infants, see *supra*, Secs. 74, 75, 76.

⁹ Middleton v. Hoge, 5 Bush, 478.

¹⁰ Deason v. Boyd, 1 Dana, 45. In this case an act of ratification concurred with failure to disaffirm for many years; and Judge Peters in his dissenting opinion in Middleton v.

Hoge, *supra*, insisted on such concurrence.

¹¹ Stern v. Freeman, 4 Metc. 309.

¹² Petty v. Roberts, 7 Bush, 410.

¹³ Code of Practice, Sec. 391.

¹⁴ Allen v. Troutman, 10 Bush, 61.

SEC. 146. GUARDIAN AND WARD. The common law guardians in socage, by nature or by nurture, are unknown to the laws of Kentucky ; but a guardian named in the father's will, for nurture and education only, may act by virtue of such appointment alone ; every other guardian derives his powers from the order of the County Judge who appoints or confirms him, and before whom he qualifies by giving bond and taking the prescribed oath.¹

In choosing a guardian, the court, unless prudence demands a different course, gives the preference, *first*, to the father or to his appointee by will ; *next*, to the mother ; *third*, to the next of kin, with a preference to males.² A female guardian does not lose her office by marrying ;³ indeed, a married woman may be appointed. In the two cases quoted, the appointment of a new guardian, made on the supposition that the mother had, by marrying a second husband, lost the character of guardian, was held null and void. A child over fourteen years of age may choose his own guardian.⁴ In case of dispute the County Court may name a temporary "curator."⁵ The guardian or curator's obligation is a covenant, with good surety, faithfully to discharge the trust of guardian.⁶ The statute does not provide for vacating the office of guardian *ipso facto*, except on the marriage of a female ward ;⁷ but when he becomes insane, incapable, or unfitted for his duties, or removes from the State, he may be removed by the court, or upon rendering his accounts he may be allowed to resign.⁸ He may also be removed for failing to make a settlement, or furnish additional security when required, or for not furnishing counter-security when called upon to do so by the sureties in his bond, and for

¹ Gen. Stat., Ch. 48, Art. I, Secs. 1, 2, 3. By Sec. 5, if the father by will direct the guardian of his children to give "no security," it shall not be required but for good cause shown. The distinction made in *Maupin v. Dulaney*, 5 Dana, 589, as to the duty of regular accounting between a testamentary and a statutory guardian can not be maintained at this day.

² *Ibid.*, Sec. 6.

³ *Leavel v. Bettis*, 3 Bush, 74 ; *Cotton's guardian v. Wolf*, 14 Bush, 238.

⁴ *Ibid.*, Sec. 7.

⁵ *Ibid.*, Secs. 8, 9.

⁶ *Ibid.*, Secs. 8, 8, 10. See *supra*, Sec. 50, as to the responsibility of the County Judge.

⁷ Gen. Stat., Ch. 48, Art. I, Sec. 12.

⁸ *Ibid.*, Sec. 11.

unfaithful conduct, as well by a "court of chancery" as by the County Court.⁹

The facts that the guardian has not filed an inventory for years (which under the statute he ought to file within sixty days), that he is asserting claims which are at war with the interest of the ward, and that his bonds of affinity to the ward have been dissevered (a step-father after the child's mother is dead), have each been deemed, in the same case, as sufficient cause for removal.¹⁰

The first section of the article on the "Appointment of Guardian and Curator" confirms the jurisdiction on the "court of the county in which the minor resides at the time of the appointment." The old statute stopped here, and a guardian could not be appointed for a non-resident infant;¹¹ but now, any real estate of such an infant, or if he has none in the State, any personalty within the county, gives jurisdiction for appointing a guardian. "But if the appointment is made by the will of the father or *mother*, etc., the jurisdiction shall be in the court of the county in which the will was proven." The subsequent sections allow such an appointment to the father only. But the Court of Appeals, taking the whole statute together, has construed father in those sections as equivalent to parent.¹²

The guardian is a trustee, and as such can not, in his fiduciary, contract with himself in his natural capacity, and for such time, after the ward comes of age, as he may be supposed to wield any influence over him, and while the guardian's accounts are unsettled, can not deal with his late ward so as to profit to the latter's advantage. But in all this matter the law of Kentucky shows no peculiar features. The compensation of the guardian is not fixed by the law, but is defined only by the word "reasonable,"¹³ and, should he as a lawyer or real estate agent perform services which another guardian would have to employ a third person to perform, he might

⁹ Gen. Stat., Ch. 48, Art. I, Secs. 13, 14, 15; Art. II, Sec. 14.

¹⁰ Windsor v. McAtee, 2 Metc. 480.

¹¹ Ware v. Coleman, 6 J. J. Mar.

198. Such the law remained till 1852.

¹² Bush v. Bush, 2 Duv. 267, 271.

¹³ Ch. 48, Art. II, Sec. 11.

properly be allowed a somewhat larger commission, on the principles discussed, *supra*, in Section 134.

Among the powers of a guardian we have already discussed those over the lands of his ward, including those to lease them and to take leases. He may also, aside of powers inherent in the office, "compound a debt or demand,"¹⁴ which seems to mean as well a debt owing by as one owing to his ward, and this with leave of the County Court; while he may compromise suits for land "with the approbation of the court,"¹⁵ which from the context must mean the circuit or equity court in which the suit is pending. The latter power is also conferred on the committee of an idiot or lunatic. The guardian must, generally speaking, use only the income of his ward's estate for his support. The first exception is still worded in phrase now obsolete; when the child is too young or weak to be bound as an apprentice, or when no master can be found for him, which in modern phrase means, when he is unable to earn a living. The other exception is this, when to give him an education would be deemed for his best interest by the court in which the account is settled; but neither he, personally, nor his real estate must be charged with his support.¹⁶ In other words, when a child can only be supported by encroaching on his lands, the statute for the sale of such lands (see *supra*, Section 76) must be invoked.

The common usage of mankind by which the guardian leaves his young ward in the custody of the father, and if he be dead, of the mother, is recognized by statute; but this recognition does not impose any burden upon the father or

¹⁴ *Ibid.*, Sec. 6.

¹⁵ Gen. Stat., Ch. 80, Art. II. Full powers are here given for carrying out such compromise by executing all needful bonds, deeds, etc. See also act of April 9, 1878, printed in B. and F. Gen. Stat., p. 281, allowing fiduciaries to compound with counties in Kentucky against whom they hold bonds.

¹⁶ Gen. Stat., Ch. 48, Art. II, Sec. 9.

It was said in an early case (*Chapline v. Moore*, 7 Mon. 150, 170) that only the Chancellor can authorize an encroachment on the principal for the maintenance of the ward. It was held in the same case (p. 176) that the guardian has no right to pay for the maintenance of the ward for a time preceding that at which the ward's estate fell to her.

mother. Where the child has an ample income from his estate, his mother need not pay his physician's bills; but if she employ medical aid for him with the knowledge and acquiescence of the guardian, the latter ought to pay for it out of such income.¹⁷ It would be otherwise if the child had been in nurture with his father; the presumption would have been that the father intended to assume the liability, and was looked to for payment, unless the contrary appeared.

The guardian is liable for interest on balances from any source remaining in his hands "from the end of the year in which the balance arose;" thereafter with interest compounded at biennial rests.¹⁸ This is for money "which he ought to have invested;" but if he uses the money himself, he would undoubtedly be still, as at common law, liable for interest, or, at the option of the ward, for profits.¹⁹ Where the administrator in whose hands the infant has his distributive share becomes the guardian of such infant, he will, in the absence of any outward act transferring the fund from the former to the latter account, be charged with interest from the time at which as administrator he should have settled his account.²⁰

Several legislative acts have been passed from time to time to instruct guardians and trustees in investing the funds in their hands. The present law only empowers courts of equity, on the petition of either the guardian or the ward, etc., to direct an investment "in real estate or safe interest-bearing bonds of the United States, State of Kentucky, or some county or town of this Commonwealth." The proviso at the end of the act "that such investment shall not relieve any such guardian or trustee, etc., from any responsibility, etc.," seems to us to make the law utterly meaningless.²¹

¹⁷ Walker v. Browne, 6 Bush, 686.

¹⁸ Gen. Stat., Ch. 48, Art. II, Sec. 10. But interest can not be compounded after the ward comes of age. (Clay v. Clay, 3 Metc. 548.)

¹⁹ Karr's adm'r v. Karr, 6 Dana, 3.

²⁰ Chanslor v. Chanslor, 11 Bush, 668; and the ward may claim any

specific article bought with his money by the guardian, though the latter have taken the title in his own name. See *supra*, Secs. 130, 131, 132, and this case as to priority to ward in guardian's estate.

²¹ Act of March 6, 1884, printed in B. and F. Gen. Stat., pp. 707, 708.

The accounts which under the statute²² the guardian must render in the County Court are, in the nature of things, taken *ex parte*. When attacked in a suit in chancery, the County Court settlement, when supported by regular vouchers, is, however, *prima facie* proof of the state of accounts, subject to be overcharged and falsified.²³

Resident guardians of non-resident infants may be ordered by the County or Circuit Court to turn over to the foreign guardian the personalty in their hands, and the rents and profits collected on the real estate, but it must appear by "documentary evidence" that the foreign guardian's bond covers the assets that would thus come into his hands.²⁴ The personalty or money of resident infants may also be removed from the State upon the order of a "court of chancery jurisdiction" when necessary in the ward's interest, while the guardian will be enjoined from removing such assets out of the State in other cases.¹

SEC. 147. IDIOTS AND LUNATICS. In Kentucky the common law rule by which no one can be confined as a lunatic, or deprived of the power to manage his affairs, otherwise than upon an inquest by a jury, stands unchanged. The power to issue writs *de lunatico inquirendo* and to appoint committees is vested in the courts of equity, and where no permanent committee is wanted, but the object is mainly to send the subject to the asylum, in any court, or before a judge at chambers.¹ The Court of Appeals has twice decided that the Chancellor

²² Gen. Stat., Ch. 48, Art. II, Secs. 12 and 13.

²³ *Maupin v. Dulaney*, 5 Dana, 589, and many other cases.

²⁴ Gen. Stat., Ch. 48, Art. II, Sec. 17. See the statute for some further prerequisites.

²⁵ Gen. Statutes, Ch. 48, Art. II, Sec. 18.

¹ Gen. Stat., Ch. 53, Art. I, Sec. 1. Art. II, Sec. 14, which authorizes inquests otherwise than under a regular suit in equity, has been amended by

act of January 16, 1882 (B. and F. Gen. Stat., p. 751), which directs: When a Circuit Court is in session in the county, the inquest shall be held only in it. (This is construed to mean when the general equity court is not in session.) When no Circuit Court is in session the inquest may be held by a Circuit Judge, Common Pleas Judge, Chancellor, or Vice-Chancellor, Presiding Judge of the County Court, City or Police Judge.

may extend his protection to those whose mind is decayed, or who are unable to manage their business on other grounds, as much as to persons of "unsound mind" in the narrower sense, and to direct an inquest into their condition;² and the present statute following these decisions embraces "all idiots, lunatics, those who from confirmed bodily infirmity are unable to make known to others by sign, speech, or otherwise, their thoughts or desires, and by reason thereof incapable to manage their estates, and those whose minds on account of any infirmity render them incompetent, etc." The committee has the same power as the guardian of an infant; but the custody of the person (where the lunatic is not in the asylum) may be assigned to another than the committee.³

While a judgment rendered against an infant without an answer by guardian is only erroneous, and such an answer at best may be put in by a guardian *ad litem*, "no judgment shall be *binding* on an idiot, lunatic, imbecile, etc., having a committee, unless the committee also be brought before the court."⁴ But while "not binding" seems not to be the same as "void," such a judgment can at any rate be set aside upon showing the defect.⁵

An action on behalf of the idiot, etc., must be brought

² Nailor v. Nailor, 4 Dana, 340; on the application of the children by the first marriage, a young, second wife, charged with seeking to gain an advantage with a husband imbecile from old age, being made a defendant; Shaw v. Dixon, 6 Bush, 645—petition by wife and children, a stranger who had bought an imbecile's land at a sacrifice being made a defendant.

³ Gen. Stat., Ch. 53, Art. I, Sec. 3.

⁴ *Ibid.*, Sec. 4. But it was held formerly in Allison v. Taylor, 6 Dana, 87, that a judgment against the lunatic without the committee is not void, but only erroneous; if the fact of unsound mind does not appear in the

record, then to be reversed by writ of error *coram vobis*.

⁵ The Code of Practice in old section 579, now 518, contemplates a suit to vacate the judgment, which takes the place of a writ of error *coram vobis* in the common law practice, for erroneous proceedings against a person under disability, except coverture. There should be no execution against a *non compos* alone, even upon a judgment recovered when he was of sound mind, but his property should be sold only in proceedings to which the committee is a party. (McNees v. Thompson, 5 Bush, 687.)

with the assent of the committee, but the court may permit a next friend to prosecute such an action.⁶

An inquest may be held to establish the fact that one theretofore judicially found to be of unsound mind has been restored to soundness.⁷ This is done on common law grounds, there being no statute directing or regulating such an inquest. But the restoration of sound mind may be proved by other evidence than a second inquest, the verdict being conclusive only as to the state of mind at the time when it was rendered.⁸

The inquest is also *prima facie* evidence of the time (if stated in the verdict or return) when the party lost his mind, especially if it is found that his mind was unsound from his birth, or that he is an idiot; but as the Commonwealth has no interest in opposition to that of the person whose state of mind is inquired into, very little weight can be given to the finding on such collateral points.⁹

The rule laid down by Coke, that a man can not stultify himself by pleading his own insanity to an action upon his contract, was never applied in Kentucky to executory contracts.¹⁰ But as late as 1845 the court thought that the rule was still in the way of the alleged *non compos* suing at law for property of which he had disposed by a fully executed contract.¹¹ In 1830 already it was held, that though the contract made by a lunatic after his being found such by an inquest is void, even under the exploded English rule, yet it may be enforced, like that of an infant, if made through the *lunatic's*

⁶ In a suit by an insane widow for dower and distributive share, it was objected that the insane dowress, in whose name the suit was brought, had no use for the money and property sued for, being as well cared for as a person in her condition could be, but the *next friend* was allowed to proceed. (*Newcomb's ex'r v. Newcomb*, 13 Bush, 544.)

⁷ *Salter v. Salter*, 6 Bush, 624, 629.

⁸ *Clark's ex'r v. Trail's adm'r*, 1 Metc. 35, 39.

⁹ *Hopson v. Boyd*, 6 B. M. 297. The

verdict of lunacy does not raise a presumption that the party was already insane at some previous time. (*Shirley v. Taylor's heirs*, 5 B. M. 99, 102.)

¹⁰ *Taylor v. Dudley*, 5 Dana, 308 (1837); a reversal, the Circuit Court having followed the old rule. The defendant in the case had not been found of unsound mind by inquest. The rule was, however, recognized (not applied) in 1829 in *Breckinridge v. Ormsby*, *infra*.

¹¹ *Hopson v. Boyd*, 6 B. M. 296, 300.

wife for necessities, such as medical services to his wife, and that the objection to assuming the assent of one who can not give assent is rather "specious than solid."¹²

It was said at an early date that such contracts as would be voidable, not void, when made by an infant, are voidable only when made by a lunatic, and therefore capable of being ratified by him when he becomes of sound mind, or has a lucid interval.¹³

NOTE.—For the manner of subjecting the estates of lunatics to the demands of their creditors, see *supra*, Sec. 131, *sub fine*. As to liens by subrogation on the lunatic's estate, see *supra*, Sec. 133.

SEC. 148. PRIVATE CORPORATIONS. All the great corporations of Kentucky, both financial and eleemosynary, such as banks, railroad, and insurance companies, colleges, etc., have been incorporated by special legislative acts, and until 1866 there was no general law under which a corporation could be formed. Several short-lived acts then followed, which were superseded in 1873 by the fifty-sixth chapter of the General Statutes, on "Incorporated Companies." Banking, insurance, and the *construction* of railroads are excepted from the purposes of "any lawful business" for which persons may associate themselves and become incorporated;¹ but there is nothing to prevent a company formed under the general law from buying and operating a railroad already built. To make this clearer, an act of March 1, 1876, amended April 5, 1878, expressly directs how those who purchase railroads (including the private roads

¹² "But suppose the committee of the lunatic should fail to procure for the wife medical or surgical aid which might be indispensably necessary, or that the profits of the estate then in the hands of the committee would not justify it, shall the wife, laboring under disease, die without aid, or depend upon the charity of the world, although he may have a competent estate for the support of himself and family? Reason and humanity alike forbid it." (Pearl v. McDowell, 3

J. J. Mar. 658, 662.

¹³ Breckinridge v. Ormsby, 1 J. J. Mar. 238. The deed of a *non compos* (not found such by inquest) passes the legal title, to be divested only upon the complaint of his heirs. (Hunt v. Weir, 4 Dana, 347, 349.) If the *non compos*, when restored, conveys to a third person, this is an avoidance of the former deed. (Cates v. Woodson, 2 Dana, 454.)

¹ Gen. Stat., Ch. 56.

of mining companies) may organize themselves, mainly in pursuance of Chapter 56.² "Any number of persons," that is, two or more, may be the corporators. We have heretofore shown how turnpike companies may exercise the right of eminent domain; and these may organize under this act. But this act gives no privileges, except such as are inherent in a corporation, which are enumerated in the second section: "(1) To have perpetual succession. (2) To sue and be sued by the corporate name. (3) To have a common seal, etc. (4) To render the shares, etc., of stockholders transferable, and to prescribe the mode of making such transfers. (5) To exempt the private property of members from liability for corporate debts. (6) To make contracts, acquire and transfer property, etc. (there being no limitation in the statute). (7) To establish by-laws, and make all rules and regulations . . . for the management of their affairs not inconsistent with the Constitution or laws, etc."

To become incorporated "they (referring to 'any number of persons,' to the corporators) must adopt articles of incorporation, which shall be signed and acknowledged by them as deeds are . . . and recorded in a book to be kept for that purpose³ . . . in the office of the clerk . . . of the county where the principal place of business is to be." Corporations for the construction of any work of public improvement shall, in addition, file a certified copy of such articles in the office of the Secretary of State, and have the same recorded, etc. Such articles (this seems to apply to all corporations) must specify the highest amount of indebtedness or liability, direct or contingent, to which the corporation at any one time shall be subject, "which must in no case exceed two thirds of its capital stock." (Sections 3 and 4.)

A notice must be published four weeks in a newspaper as convenient as practicable to the principal place of business,

² B. and F. Gen. Stat., pp. 767, 768.

³ By a later clause the incorporation is "done" when the articles are filed for record. To put them in a separate book, and not in a common

deed-book, is the duty of the clerk, and his mistake in copying the articles in a book of the latter kind can not destroy the corporation. (*Walton v. Riley*, 85 Ky. 418.)

stating: (1) The names of the corporators, name of the corporation⁴ and its principal place of . . . business. (2) The nature of the business proposed, etc. (3) The amount of capital stock authorized, and the times when and conditions on which it is to be paid in. (4) The time of commencement and termination, etc. (5) By what officers the affairs are to be conducted, and the times at which they are to be elected. (6) The highest amount of indebtedness or liability, etc. (7) Whether private property is to be exempt from the corporate debts." (Section 5.)

It will be seen that this law contemplates only share or joint stock companies, in which men embark their capital with a view to profit, not religious, charitable, literary societies, social clubs, etc. This defect has been partly supplied by an act of March 29, 1882, subjoined to Chapter 56, in Bullitt and Feland's General Statutes.

The corporation can begin business as such "as soon as the articles are filed for record in the office of the County Court clerk, and their acts shall be valid if the publication . . . is made (and copy filed with Secretary of State when necessary) within three months from such filing" (Section 6.) In a case where a corporation was gotten up among the members of a family, and the articles were recorded, but the notice not published in time, the court was unwilling to recognize the corporation, since to do so would have allowed the wife of the principal member to swallow up the assets as a corporate creditor, excluding his outside creditors.⁵ But the decision has been expressly overruled in a case decided in 1887, in which stress is laid upon the seventeenth and eighteenth sections, to be noticed hereafter. A turnpike company, not having filed its articles with the Secretary of State until nearly ten months from the filing in the county clerk's office had elapsed, it was insisted that the organization thereby fell to the ground, and

⁴ The absolute freedom left in contriving a name for a corporation is a grave defect in the law. It is often abused by firms, who, when turning themselves into corporate bodies, re-

tain the old firm names, such as "John Smith & Co.," or "John Smith & Sons."

⁵ *Heinig v. Adams & Westlake Manufacturing Co.*, 81 Ky. 800.

all subsequent proceedings were void. The court held that in order to give effect to the whole law, the only effect of not complying with the requisites other than filing the articles in the county clerk's office, is this, that an action to vacate the franchise could be maintained.⁶ Perhaps the failure to make the newspaper publication would be deemed a badge of fraud.

Section 6 of the act also requires changes in the articles and terms to be recorded and published in like manner as the original terms.

Corporations for internal improvements may be formed for fifty years, other corporations for twenty-five years; and those of either kind may, by a vote of three fourths of those voting, be renewed when the terms expire. (Section 7.) Unless the articles provide otherwise, the body can not be dissolved before its expiration, except "by a majority of the stock of its members," and such "premature dissolution" must be preceded by a (four weeks) publication. (Section 8.)

By "non-user" for five years at any one time, such a corporation shall cease to exist, but not by omission to meet or elect officers on the charter day. (Section 12.) At the expiration of the charter or dissolution the corporation may continue for the purpose of winding up. (Section 13.) Members are liable for the corporate debts to the extent of the unpaid portions of their stock subscriptions, "and an execution against the company may to that extent be levied on the private property of such individual." (Section 14.) In practice, however, a suit in equity, after a return of *Nulla Bona*, is the better and more usual remedy.

"Persons acting as a corporation under . . . this act shall be presumed to be legally organized until the contrary is shown, and no such franchise shall be declared . . . null, etc., except in a . . . proceeding brought for that purpose." (Section 17.)

"No persons, acting as a corporation under . . . this act, shall . . . rely upon the want of a legal organization as a defense to action brought against them as a corporation; nor shall any person . . . sued on a contract made with such corpora-

⁶ Walton v. Riley, 85 Ky. 418.

tion, or sued for an injury . . . or wrong done to its interests . . . rely upon such want of legal organization for his defense." (Section 18.)

We have elsewhere spoken of Section 11, which treats of stock transfers.⁷

The other parts of the act treat of the production of books, punishment for fraud, fees to officials, etc.

We have shown how a legislative charter can be made to take effect upon the passage of a similar charter by another State (*supra*, Section 23). It was held in 1880 that a bridge company, which by necessity had obtained corporate rights, both in Kentucky and in Ohio, working as one corporation and with one name only under the laws of both States, might be treated by those dealing with it as a corporation foreign to Kentucky, and that its property might be here attached on that ground.⁸

Where a Kentucky act grants to a foreign railroad corporation the right to extend its line into this State, and "all the privileges, rights, and immunities" that are conferred on it by its home State, it remains indeed a foreign corporation, but is free from the disabilities of such a body, and an attachment can not be granted against its property on the ground of its being such a foreign corporation.⁹

The extension of a legislative charter by another act does not constitute a new corporation. Hence, though an act was passed after February 14, 1856, extending the life of a corporation created before that day, it remains still secure against legislative change or repeal.¹⁰

The provisions for "Limited Partnerships" still found in Chapter 82 of the General Statutes, and which are modeled upon the French *Société en commandite*, have fallen altogether into disuse, as all the purposes of such a partnership can be much more fully and easily reached through an "Incorporated Company."

⁷ See *supra*, Sec. 117.

⁸ Newport & Cincinnati Bridge Co. v. Woolley, 78 Ky. 523.

⁹ Martin v. Mobile & Ohio R. R.

Co., 7 Bush, 116, 121. In conflict with case in Note 8.

¹⁰ Franklin County Court v. Depos. Bank of Frankfort, 87 Ky. 870, 887.

SEC. 149. PRIVATE CORPORATIONS—STOCKHOLDERS AND DIRECTORS. The subscriptions to stock in a corporation are binding, though not made by a connected written contract, or by a writing of any kind, unless the charter demands it.¹ Though the subscription be made before the corporate body is formed, and though it be originally only a contract between the subscribers as individuals, yet the corporate body can sue upon it² for the recovery of the amount subscribed, and this, though the charter do not authorize such a recovery by express words, and though it may provide by such words for a sale or forfeiture of the delinquent stock.³

The liability of the stockholders to the creditors of the company for the amount of unpaid stock subscriptions, or of unlawful dividends received, is carried in Kentucky as far, and is enforced as rigidly as anywhere. Thus, where the charter of a trading company made the stockholders ratably liable to its debts, after the exhaustion of the corporate funds, a subscriber who had caused his stock to be made out in the name of his infant children had to contribute.⁴ And the same reasoning would apply to one who would, in an ordinary corporation, place the stock which he has subscribed in the name of a married woman or of an infant, to the extent that the stock is not fully paid for.

This liability of the stockholders to pay up their stock fully, when necessary to discharge the corporate debts, is often worked out by a creditor's bill, the creditor having obtained a judgment and return of "no property;" and any release by the corporation to the subscribers would be looked upon as a fraudulent conveyance.⁵ But in an early case growing out of

¹ Gill v. Kentucky & Colorado Mining Co., 7 Bush, 640.

² *Ibid.*, and Twin Creek T. P. R. Co. v. Coleman, 79 Ky. 552.

³ Instone v. Frankfort Bridge Co., 2 Bibb, 576; Gratz v. Redd, 4 B.M. 178.

⁴ Holmes v. Castleman, 4 J. J. Mar. 1, 7. This mode of taking stock is denounced as a fraud; yet the court only decides the case on the strength of some admissions, and declines to lay down a general rule. In this case

the charter put the burden on those who owned the stock "at the time the debt should be contracted." A note being renewed, the date of renewal was deemed the proper time; those owning the stock at that date were held bound.

⁵ Redd v. Gratz, *ubi supra*. The stockholder was here held for amount of unlawful dividends received; but the liability was the same as if to that extent the stock had not been paid.

the failure of the Lexington & Ohio Railroad, the liability of the stockholder was put upon the higher ground of the general equity, that where the corporation has come to an end, unpaid subscriptions, or dividends unlawfully paid out of the principal, are a trust fund for the satisfaction of the corporate creditors.⁶

An exception to the rule compelling all shareholders to pay up to the nominal amount of their shares, when such a payment is required for the satisfaction of corporate debts, was made in a case in which the creditor, or rather the indorser, on whose personal credit money was borrowed, was himself a member and director fully conversant with the facts, and the debt was contracted in violation of the "articles," *i. e.*, in a much larger amount than that which the articles allowed. It was said that here was a controversy between members, and this must be governed by the articles of incorporation. It seemed to be admitted that if the creditors were strangers, not indemnified by a member, and having no actual notice, the limitation of the corporate debt in the articles would protect neither the corporate body nor such of the stockholders as had not paid up their stock according to its nominal figures.⁷

Where the enforcement of a subscription is made to depend by its own terms upon a given sum having been first subscribed, a number of questions will naturally come up. Of course, subscriptions made by a town or county can only be counted, if such political body was by law empowered to subscribe; and the subscriptions of married women, of infants, or insolvents can be counted only if they are actually paid in. Where a subscriber reserves the right to pay for his stock in work or material at stated prices, the stock should be counted only at the actual value of the thing to be exchanged

⁶ *Dudley v. Price's adm'r*, 10 B. M. 84. The suit failed because the answer supplying the necessary averments wanting in the petition was filed more than five years after the the corporation was dissolved, by giving up its property and franchises to

the State. This answer was put on the footing of a bill of amendment, and the case has become the leading case in Kentucky on the doctrine that the Statute of Limitations runs until the petition is perfected.

⁷ *Haldeman v. Ainslie*, 82 Ky. 395.

for it; but such a subscription is not to be rejected as being "conditional." Should a municipality reserve the right to pay for its stock in its own bonds at par, these would, in making the computation, have to be scaled to their market value; but if the subscription was in general words the acceptance by the company of bonds not salable at par can not affect the result.⁸

The liability of ordinary paid officers, such as the cashier or teller of a bank, the superintendents, freight or passenger agents of a railroad, depends on the same principles as those of men employed by natural persons. But the liability of directors who get no salary, or perhaps a small and almost illusory reward for their attendance, and who give their services mainly because as stockholders they are themselves interested, will be measured by a different standard. They can render themselves personally bound for losses, either to the company or to its creditors or bailors, by gross neglect, and certainly to the former by illegal misappropriation of the company's funds, and to the latter by assenting to an unlawful wasting of their property by the company.⁹ But the cases in which the court, upon demurrer and in theory, declared in favor of the liability led to no substantial results, for upon the merits the directors were always exonerated.¹⁰ In the last case in which it was sought to hold directors responsible for negligently allowing the cashier to embezzle all the capital of the bank, and the special deposit of a customer besides, the court said: "It is not a question as to how the fraud of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence which ordinarily prudent men in the conduct of *such* business would

⁸ Philips v. Covington & Cincinnati Bridge Co., 2 Metc. 219.

⁹ United Society of Shakers v. Underwood, 9 Bush, 609; Jones v Johnson, 10 Bush, 649.

¹⁰ United S'ty of Shakers v. Underwood, 11 Bush, 265; in Jones v. Johnson the directors were held liable for canceling certain stock of their own,

not for negligence, and a judgment to that effect was affirmed in 1887. (See n. 12.) In Jones v. Johnson it was held, that such a suit may be brought by one or more stockholders for themselves and all others, if the directory of the corporation for the time being, or its assignee in insolvency, is unwilling to bring the suit.

have exercised. . . . The directors received no compensation, etc. With services rendered that are merely gratuitous, . . . it can not be held that a liability is to be fixed upon them for . . . their failure to detect the fraudulent entries made by the cashier, . . . although extending through . . . nine years." "

In another case it was said of the directors that they "do not insure the fidelity of the cashier," not even to strangers, and much less to the stockholders. "The president with a nominal salary" was to "be held to . . . the use of ordinary care only." Whatever this means, however, he was acquitted of all responsibility, along with the other directors.¹¹

SEC. 150. PRIVATE CORPORATIONS—POWERS, AND HOW EXERCISED. The doctrine of *ultra vires* is not pressed very far in Kentucky. Before 1847 the "Newport Lyceum," a corporation that had by its charter no banking powers of any kind, employed an engraver, through its president and "cashier" (which officer ought not to have existed), but with the tacit assent of its directing board, to make steel plates and to strike off checks in a form fitted to serve for circulating bank bills. Though the only use to which these checks could be put was not only unauthorized, but grossly illegal, and the engraver could hardly have helped knowing it, he was allowed to recover from the corporation for the work done,¹ on the ground that a stranger must be presumed to be ignorant of the unlawfulness of the corporate act. And where articles of association provided for the purchase of "timber lands, or any other lands necessary or convenient for its business" (of a lumber company), the corporation was sustained in its purchase of a tract of land, though a great part of it was cleared of timber and could only be used for farming.² And though a bank was forbidden by its charter from accepting the name

¹¹ Myer v. Caperton, 87 Ky. 306, 313.

¹² Dunn's adm'r v. Kyle's ex'r, 14 Bush, 184; Jones' assignee v. Johnson, 86 Ky. 530; where "good faith" is made a cover for all shortcomings of the directors.

¹ Underwood v. Newport Lyceum, 5 B. M. 129, where it is said that a corporation may be responsible for the trespasses of its officers.

² Kentucky Lumber Co. v. Green, 87 Ky. 257.

of a director as surety on any discount, his suretyship, if given, does not on this account become void.³

A corporation being misnamed, either in a contract with it or in a devise in its favor, is immaterial, as long as it can be identified from the appellation given.⁴ About the only purpose for which a corporate seal is still necessary is the conveyance of the legal title to land, but the corporation might, like an individual under the act of 1797, adopt a mere ink scroll as its seal.⁵ *Quære*: Is a scroll still a good corporate seal under the Revised or General Statutes? They repeal all old statutes and recognize a scroll only in the opening words of a section. "A seal or scroll shall in no case be necessary, etc.," which closes thus: "But this section shall not apply, nor . . . alter any law requiring . . . the seal of . . . corporation."⁶ Or does this phrase keep the statutory law, as it stood in 1852, unaltered?

The directors of a corporation bind it not only by their formal action, but also by their wrongful misrepresentations, made by them individually, or even by their non-action. Where the directors of a National Bank elected as cashier one guilty of defalcations in the banking firm, whose assets were transferred to the bank, and "made no examination" of these assets, and afterward allowed a false quarterly report to go out under the oath of the cashier and the signatures of three of their number attesting its correctness in conformity to the National Banking Law, this was deemed to be a wrongful act by the corporation itself, which thus held the cashier out to the public as honest, and the sureties, who, believing him to be honest, went on his bond, were excused from liability for his subsequent shortage.⁷

The president of a bank or other corporation has no implied power to compound its demands by accepting less than

³ *Bank of Commerce v. Triplett*, 6 J. J. Mar. 549.

⁴ *Pendleton v. Bank of Kentucky*, 1 Mon. 171, 187; *Cromie v. Louisville Orphans' Home Society*, 8 Bush, 365; *Kentucky Seminary v. Wallace*, 15 B. M. 85, 44.

⁵ *Reynolds v. Trustees of Glasgow Academy*, 6 Dana, 37, 39. That there was a scroll to each name did not defeat the deed.

⁶ Gen. Stat., Ch. 20, Sec. 2.

⁷ *Graves v. The Lebanon National Bank*, 10 Bush, 23.

the full amount.⁸ Nor has the president of a land company, in the absence of any by-law or resolution to that effect, the power to bind the corporation by a written agreement to convey a lot, whether as in this case in consideration that the grantee would build upon it, or, it seems, upon any other consideration.⁹

NOTE.—As to liability of directors to account as trustees for corporate property which they may acquire, see *supra*, Section 140.

⁸ Wheat v. Bank of Louisville, 9 Ky. Law Rep. 738.

⁹ Enterprise Improvement Co. v. Wilson, 11 Ky. Law Rep. 4.

CHAPTER XXV.

JUDGMENTS AND BONDS.

SEC. 151. Judgments—When Binding—How Opened.

SEC. 152. Foreign Judgments.

SEC. 153. Bonds Having the Effect of a Judgment.

SEC. 154. Other Judicial Bonds—Validity.

SEC. 155. Other Judicial Bonds—Construction and Effect.

SEC. 156. Bonds of Fiduciaries.

SEC. 157. Officers and Public Agents.

SEC. 158. Official Bonds—Extent of Liability.

SEC. 159. Other Bonds and Covenants.

SECTION 151. JUDGMENTS—WHEN BINDING—HOW OPENED. The highest obligation known to the law is that imposed by the judgment of a court of record. However, much of what will be said here about judgments applies to those that create a lien or interest in property, as well as to those which fix an obligation.¹

The Code of Practice gathers up, in Section 518 (old 579), the pre-existing grounds for which a judgment may, after the term, be vacated or modified by the court which rendered it. But it strikes from them the right to open a judgment at law by setting up an equitable defense, which must now be made in the action at law.² Under the head of “Usury” we shall show some violations of the principle.

The Code also puts an end to that irregular kind of appeal from the uninformed to the better informed chancellor, which was known as a bill of review for error of law appearing in the record. The grounds still in force are eight, of which all but the first three must be set up by means of a new suit. The judgment may be vacated, etc.:

¹ Act of May 5, 1880 (B. and F., G. St., Ch. 394), regulates appeals.

² O. P., Sec. 17 (old 14). “A judgment . . . shall not be annulled, etc.,

by any order in an equitable action except for a defense which arises or is discovered after rendition of the judgment.”

1. "By granting a new trial for the cause and in the manner prescribed in Section 344;" that is, for newly discovered evidence. This is too much a matter of "practice" to be treated in this work.

2. "By a new trial granted in proceedings against defendants constructively summoned, etc.;" which we have already discussed under the head of "Constructive Notice" (*supra*, Section 69).

3. "For misprision of the clerk;" that is, for errors in the judgment that are apparently not the result of a mistaken view taken by the judge of either law or fact, but of negligence in putting the decision into words.³ Instances are the insertion in a judgment by default of a sum different from that stated in the petition, or the direction to count the interest from a different date than such as is there indicated;⁴ or the omission of the contents of one note, where the petition is based on several notes, and there is no defense;⁵ or where the petition allows a credit and it is not given in the judgment;⁶ or to render a judgment in favor of the assignor and assignee of a demand jointly, instead of one in favor of the assignee alone.⁷ An order to correct a judgment for clerical misprision is void, unless made on notice to the opposite party.⁸

³ If the error "consist in the mistake of the clerk and not the judgment of the court, and there exists any thing in the record by which it can be amended," etc. (Dodds v. Combs, 3 Met. 28, 29.) The correction may be made after an affirmance in the Court of Appeals. In *Maddox' ex'r v. Williams*, 87 Ky., 147, 152, it is said *arguendo* that the grounds of the Code for vacating judgments in the court below apply to those that are affirmed, or rendered under the mandate of a higher court. But this would hardly apply to the eighth ground in its full extent.

⁴ *Wilson v. Barnes*, 13 B. M. 330; *Clark v. Finnell*, 16 B. M. 329; *Johnson v. Bank of Kentucky*, 2 Duv. 521, where Judge Robertson says it

might be an inadvertence of the judge, and still a clerical misprision.

⁵ *Smith v. Mullins*, 3 Met. 182.

⁶ *Dodds v. Combs*, *ubi supra*; *Long v. Gaines*, 4 Bush 353; *Hieronymous v. Mayhall*, 1 Bush, 508, *aliter*, where the credit is drawn into issue, and may have been passed upon.

⁷ *Tong v. Eifort*, 80 Ky. 152.

⁸ *Seiler v. Northern Bank of Kentucky*, 86 Ky. 128, 135. Here also an excess of about \$34 in the first judgment appeared on an aggregate of about \$15,000. The Court of Appeals resolved a doubt about this, between error and "misprision," in favor of the latter to avoid a reversal, as a motion (under Sec. 516) must be made below to correct a misprision, before appeal. The same course was

That a judgment has been rendered prematurely is, by Section 517 of the Code, declared a clerical misprision. For the decisions under this head which deal with details of practice, we refer the reader to the cases collected under this head in Carroll's Code.

4. "For fraud practiced by the successful party in obtaining the judgment," which must be treated together with ground

7. "For unavoidable casualty or misfortune, preventing the party from appearing or defending."

These two grounds take the place of bills to impeach judgments for fraud or accident, and of original bills in the nature of bills of review, which were well known to the old chancery practice; and they are governed very much by the old rules on the subject. By another section (521) the judgment is not to be set aside on these and other grounds, unless it also appears that there is a valid defense where the judgment was against the defendant, or a valid cause of action where the judgment is against the plaintiff; and the court may decide on the grounds first, and on the merits afterward. (Sections 521 and 522.) It follows that a decision may be given setting aside the former judgment and ordering a new trial, though, it seems, only if a *prima facie* case is made out on the merits; and such a decision is a final judgment, subject to appeal.⁹

The suit to vacate a judgment must be brought by a party beneficially interested, not by a nominal party.¹⁰ The defendant in a judgment can not have it set aside for fraud committed by his co-defendant.¹¹ That a judgment was not authorized by the pleadings or proofs does not bring it within these or any other of the statutory grounds for a suit to vacate it.

That a defendant is of unsound mind, not being found such judicially, and having no committee, is the strongest case of

pursued (*de minimis*, etc.,) in *Clark v. Finnell*, *supra*. Most of the decisions showing what "misprision" is were made to avoid a reversal for error.

⁹ *McCall v. Hitchcock*, 7 Bush,

615; *Same v. Same*, 9 Bush, 76.

¹⁰ *Phillips v. Skinner*, 6 Bush, 662.

¹¹ *Dillingham v. Mudd*, 1 Bush, 102.

This was a proceeding to open a judgment during the term upon motion. (*Hayden v. Moore*, 4 Bush, 107.)

“casualty or misfortune.” If a defendant is misled by the plaintiff, or the plaintiff’s attorney, into suffering a default, the judgment is tainted with fraud; if misled by a co-defendant, there is no ground for relief under either of the two clauses.¹² Where a deed that could have been found by ordinary research was overlooked by a defendant, there is neither “casualty nor misfortune,” nor “newly discovered evidence” within the meaning of the law;¹³ otherwise, where the indexes in a county clerk’s office have been destroyed and the missing deed could only have been found by turning the pages over one by one.¹⁴

A gentleman from another State being, on his departure from Kentucky, served with a summons on behalf of his host and pretended friend, tore it up in a fit of anger. Being sued also by others in the same court, he employed an attorney to defend him in all the cases, and he and his attorney, though assisted by the clerk, could not find that case; it was not defended, and judgment was rendered against him for a large sum on a fanciful claim. Though but for his tearing the summons, he must have found the case, he was relieved on the ground of “unavoidable casualty.”¹⁵

A suit to vacate a judgment for fraud brought up, in 1861, a very important question as to the validity of a judgment entered by the consent of the attorney, the party not being in court, and not having given any authority to the attorney who consented on his behalf. There was gross and obvious unfairness; a petition in equity setting out an apparently valid claim to lands worth \$50,000 being compromised for \$1,300 in money paid to the lawyer, who is described as insolvent and irresponsible, and judgments barring the claim being entered. The Court of Appeals, in reversing a dismissal of the suit to vacate, refused to enter into the merits

¹² Bean v. Haffendorfer, 88 Ky. 685.

¹³ Denny v. Wickliffe, 1 Met. 216.

¹⁴ Elliott v. Harris, 81 Ky. 470. This looks doubtful. The absence of the index warned the party search-

ing for the deed in what way alone he could find it, and he must have found it at last by going through the deed book page by page.

¹⁵ McCall v. Hitchcock, 9 Bush.

of the original suit, and simply ordered a judgment to be entered, setting aside the pretended consent judgments in the first suit, so that the plaintiff's heirs might go on and carry it to a conclusion.¹⁶ Older cases were relied on to sustain the consent judgments, but these did not go beyond the acknowledged rules; in one of them an acquiescence of thirteen years helped to supply the new "warrant of attorney" for the attorney's act in consenting to a new trial at a subsequent term; the other was a consent to a particular distribution of a common fund—a subject on which agreements of counsel are very common.¹⁷ It was also held that an attorney, who is employed to recover land and was to have one half of the thing recovered, has no power to receive money or other thing and release the judgment; and such release did not gain any force, when made without authority, by being entered as an order in open court.¹⁸

5. "For erroneous proceedings against a person under disability, except coverture, if the condition of such defendants does not appear in the record, nor the error in the proceedings." This ground takes to some extent the place of the old writ of error *coram vobis*. The words, "except coverture," were only introduced by the Code of 1876. The Court of Appeals has partially made up for this omission by declaring, as we have seen above, that a personal judgment against a married woman when unauthorized is void, but the point can no longer be raised by her by a suit to vacate.¹⁹

6. "For the death of one of the parties before the judgment in the action." Such judgments are indeed void, at least when rendered after *all* the persons constituting one or the other party are dead. But it was held that the death of the appellant during proceedings in the Court of Appeals does not render the judgment or mandate of reversal void; whether it might have been set aside upon proper application on account of the previous death of "one of the parties" was left undecided.²⁰

¹⁶ Smith's heirs v. Dixon, 3 Met. 43. M. 126.

¹⁷ Holbert v. Montgomery's adm'r, 5 Dana, 12; Story v. Hawkins, 8 Dana, 13.

¹⁸ Harrow v. Farrow's heirs, 7 B.

¹⁹ It may work hard where the judgment is *in rem*. See *supra*, Sec. 22, n. 6, Bagby v. Champ.

²⁰ Spalding v. Wathen, 7 Bush, 659.

8. "For errors in a judgment, shown by an infant twelve months after arriving at full age, as is prescribed in Section 391." Looking back to that section we find that an infant married woman is debarred from its benefit. It is no longer necessary, as under the old chancery practice, to reserve time in the decree against an infant; the law does it once for all.

The infant may bring his suit to vacate the judgment before he comes of age.²¹

A "judgment does not prevent the recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counter-claim in the action."²²

An exception has lately been established to the rule that makes a judgment, rendered by a court having jurisdiction against a defendant lawfully summoned, binding and conclusive. A personal judgment having been rendered against a married woman upon a contract made during coverture, but not within any statutory power, she pleaded to a suit brought for the enforcement of the judgment that it was void, and her plea was sustained.²³ However, the facts showing its voidness must come from her, as there are many cases in which such a judgment might be rendered.

It was held in the same case that a judgment which is rendered in favor of the "heirs" of A. B., though informal, and perhaps erroneous, is not, on that ground only, void; and this upon the authority of a much older case.²⁴

Judgments for money or personal property in the Circuit Court, or court of similar jurisdiction, may be taken by appeal to the Superior Court or Court of Appeals, unless the matter in controversy be *less* than one hundred dollars, exclusive of *costs*.²⁵

²¹ Newland v. Gentry, 18 B. M. 666; Allen v. Troutman's heirs, 10 Bush, 61.

²² C. P., Sec. 17.

²³ Spencer v. Parsons, 11 Ky. Law Rep. 769; on a former appeal Parsons v. Spencer, 83 Ky. 305.

²⁴ Shackelford v. Fountain's heirs,

1 Mon. 252. In this case it was assumed that the names of the heirs (plaintiffs) were to be found in former parts of the record, though omitted in the judgment, replevy bond, and execution.

²⁵ B. and F. Gen. St. (Act of May 5, 1830), p. 394.

An error in a judgment or decree in equity, of awarding too little to the plaintiff, is not released by his collecting the judgment as far as it goes.²⁶

Formerly a plaintiff, who either at law or in equity recovered less than his demand, was deemed to waive the error by collecting the judgment he had.²⁷ A late statute abolishes this rule, and the enforcement of the smaller judgment is not now a bar to an appeal asking for the recovery of more.²⁸

A judgment can not be entered in Kentucky upon a *cognovit*, or warrant of attorney, given before suit brought. Should it be entered, it is void, and all concerned in entering it liable to punishment.²⁹ However, a judgment is some times used as a security for a loan, being entered upon confession, or upon pleadings for both parties, with a stay of execution for the time agreed on.

The rule that a judgment of a court can only affect the personal rights of parties regularly before the courts has lately been applied to a class of cases in which it used to be wholly neglected; to an order of a court of equity removing an old trustee and discharging him from further liability, all the beneficiaries not being before the court.³⁰

SEC. 152. FOREIGN JUDGMENTS. We have heretofore referred to a case in which a Virginia judgment rendered against bail on two returns of *nihil* was enforced.¹ This is actual service, made with a view to a personal judgment. Thus also an Ohio judgment, based on a summons, which was served on a resident of Ohio by leaving it at his last residence, was deemed a good judgment *in personam*.² A similar service was recited in a record from Upper Canada. Our courts in an action upon it scanned the Canadian law, and conceiving that it had not been fully complied with, or did not apply to the facts, held

²⁶ Act of March 24, 1888, Appendix to B. and F. Gen. Stat., p. 8, enacted to do away with the decision in *Payne v. Woolley*, 80 Ky. 568.

²⁷ *Payne v. Woolley*, 80 Ky. 568.

²⁸ Act of March 24, 1888, amending Sec. 757 of Code. (B. and F. G. St., App. 8.)

²⁹ G. St., Ch. 19, re-enacting act of 1796. (M. and B. St. I, 412.)

³⁰ *Mobberly v. Johnson's ex'r*, 78 Ky. 273.

¹ *Delano v. Jopling*, 1 Litt. 118-417; see *supra*, Sec. 68, n. 6.

² *Biesenthal v. Williams*, 1 Duv. 329.

that the Canadian court had no jurisdiction and that its judgment was void.³

Where the transcript from a sister State shows that the defendant has not been summoned, but that "the parties appeared by their counsel," the judgment rendered upon such appearance is binding, and a plea denying that the defendant did in fact appear can not be entertained.⁴ And so where a suit in a sister State is brought against persons not residing in it, both to seize and subject certain property within it, and to have a judgment *in personam*, the defendants by entering an appearance by counsel of their own choice, and by taking proof, submit themselves generally to the jurisdiction of the foreign court, and the personal judgment is enforceable here.⁵

Kentucky was, however, one of the first States to reject a personal judgment or decree rendered in a sister State against an absent defendant upon proceedings by publication or *ex parte*, where the main object of such a proceeding was to reach lands, goods, or effects within the jurisdiction: without inquiring whether the foreign law allows such personal decree to be rendered;⁶ and it has furnished to the Supreme Court of the United States good precedents for its well known decisions in *Galpin v. Page* and *Neff v. Pennoyer*.

But the decree thus rendered *in rem* may be conclusive as to collateral matters; for instance, to the fact that there was a suit and decree to the amount realized on the debt, or the amount which a surety had to pay on behalf of his principal, etc.⁷

The judgment of a justice of the peace in a sister State is deemed not to be within the Federal compact, and no better than a foreign judgment; it may be impeached on the merits,

³ *Kerr v. Condry*, 9 Bush, 372.

⁴ *Roberts v. Caldwell*, 5 Dana, 512.

⁵ *Whiting v. Johnson*, 5 Dana, 392. (There was a petition for rehearing, and a second application, when the matter was compromised.) The same principle has been carried so far in suits *in rem* brought in Kentucky, that the absent defendant can not

answer without submitting to a judgment *in personam*, though he expressly disclaims an appearance. (*Tipton v. Wright*, 7 Bush, 448.)

⁶ *Rogers v. Coleman*, Hardin, 413; *Williams v. Preston*, 3 J. J. Mar. 600, 607.

⁷ *Cobb v. Haines*, 8 B. M. 189.

but is a good ground for recovery where nothing is shown to the contrary.⁸

The exclusion of a counter-claim or set-off in the sister jurisdiction, not upon its merits, but because the court there deems it not germane, or for want of prosecution, is not binding upon the Kentucky court, in which the same counter-claim or set-off may therefore be set up.⁹

A suit was brought in Kentucky to enforce the decree of an Indiana court in which a decedent's estate was divided between the heirs living in that State and a daughter of the decedent, who lived in Kentucky and to whom the land in Kentucky was allotted. Having received quit-claim deeds from all the adult heirs, she afterward sued the infants and their guardian in Kentucky to have the Indiana decree enforced by a deed from them, which could only be a commissioner's deed; and the Court of Appeals sustained the suit.¹⁰

SEC. 153. BONDS HAVING THE EFFECT OF A JUDGMENT. The "replevy (or replevin) bond" for staying a judgment for money,¹ a sale bond taken at an execution or judicial sale, and a bond given for the forthcoming of personal property levied upon under an execution, all have the force of a judgment.² When such a bond is over due, the clerk of the court to which it is returned may, at the request of the plaintiff or party in interest, issue execution upon it,³ which will be indorsed "no security of any kind to be taken," as well against the sureties as against the principal in the bond. The creditor

⁸ *McElfatrick v. Taft & Son*, 10 Bush. . . . In some States it is held that the transcript from a justice's docket does not prove his jurisdiction; but, when that is proved *aliunde*, his judgment is as conclusive as any other.

⁹ *Rankin v. Barnes*, 5 Bush, 20. It was a suit on a justice's transcript, but the reasoning is applicable to any other record.

¹⁰ *Page v. McKee*, 3 Bush, 139. The suit was deemed transitory, not being a suit for partition. It was

held to be properly brought in a county in which the defendants were summoned.

¹ See *supra*, Sec. 68, n. 1. A replevy bond may be given under a distress warrant. (Gen. Stat., Ch. 66, Art. II, Sec. 24.)

² Courts have sometimes demanded that a bond given for money loaned out of a court, under Sec. 308 of the Code of Practice, should have the force of a judgment.

³ Gen. Stat., Ch. 38, Art. XI, Sec. 1.

can insist that all the parties liable to him shall join in the bond; that is, all the judgment defendants in the replevy bond, all the purchasers in the sale bond, all the owners of the chattel to be forthcoming in the forthcoming bond; and if any of these fail to join, he can have the bond quashed, and fall back on his previous rights. While formerly he might do so, even after causing an execution to be issued on the bond, and thus collecting a part of its contents, he must now exercise his option before he has either in this manner or by long acquiescence ratified the bond.⁴ The right is of great importance as to a replevy or sale bond, for as long as it stands it operates as satisfaction in whole or *pro tanto*,⁵ and the outstanding principal may be solvent, while the surety is not. But neither the principal nor the sureties, who sign the bond, can escape on the ground that another principal failed to sign; and where of several defendants the one primarily liable replevied the debt, those who were sureties for him in the judgment may take an assignment of the replevy bond from the creditor.⁶ In two old cases, which would perhaps not be followed now, an execution against one was issued upon a judgment for two; the replevy bond given by the one execution defendant with his surety was quashed at the instance of the obligor, because such an execution was irregular.⁷

Where a bond of this class as returned by the officer is not attested, is faulty in form, is for too much or too little, it might, perhaps, be quashed; but until it is quashed it has the force of a judgment.⁸ It might, however, be so far irregular as to lose this character; for instance, if a sale bond

⁴ Skinner v. Robinson, Hardin, 4 (1808), is overruled by Hughes' adm'r v. Hardesty, 13 Bush, 364, limiting the plaintiff's right to quash the bond. The last case where the bond was quashed is Southern Bank of Kentucky v. White, 1 Duv. 291 (1865). It is misfeasance in the officer to allow one of several defendants to replevy. (Miller v. Commonwealth, 4 B. M. 304.)

⁵ So stated in nearly all the cases

on the subject. See especially Hanna v. Guy, 3 Bush, 91, and cases there quoted.

⁶ Kouns v. Bank of Kentucky, 2 B. M. 303. Under the practice of that day the sureties used the name of the bank.

⁷ Faught v. Byrne, Hardin, 830; Morel v. Barnes, 4 Litt. 10.

⁸ Hopkins v. Chambers, 7 Mon. 261; Prather v. Harlan, 7 Bush, 186.

or forthcoming bond should be taken upon an execution indorsed "no security to be taken," or if a replevy bond were taken upon a credit of six months, in such a case it would still stand good as a "common law" bond against both principal and sureties, the forbearance by the creditor, though imposed upon him without his consent, being a good consideration.⁹

"If the plaintiff in any bond having the force of a judgment shall at any time, for the space of one year, while he is entitled to have execution, fail to issue execution and in good faith prosecute, etc., the surety in such bond shall be released from all liability, etc."¹⁰

Sale bonds in chancery proceedings may be and often are enforced by "rule and attachment." It has never been claimed that the surety is discharged because the proceedings upon such a rule may be drawn out for more than a year, though upon a literal reading of the statute he would be.¹¹

Where a bond for money borrowed out of court has the force of a judgment, the year in favor of the surety only begins to run from the time when the court decides to whom the fund belonged, for then only was there a party "entitled to have execution."¹² This was held even as to a sale bond taken in a chancery case, where the right to its proceeds had not been adjudged so as to authorize any one to control an execution on the bond.¹³ But where an execution upon the replevy bond is satisfied by the sale of the principal's property to the plaintiff, who afterward loses the benefit of the purchase, he may in some cases have the return quashed so as to

⁹ See decisions below as to other statutory bonds; also *Spradlin v. Pieratt*, 12 Bush, 496; "such bonds are supported by a good consideration."

¹⁰ Gen. Stat., Ch. 104 (Sureties, etc.), Sec. 12.

¹¹ *Kaye v. Moody*, 10 Ky. Law Rep. 160. Where proceedings on the bond are delayed at the surety's instance, while an endeavor is made to make another fund available for his relief,

he can not claim relief.

¹² *Rankin v. White*, 3 Bush, 545; *Barbee v. Pitman*, *Ibid.* 359; loan bond, surety not relieved; *Winter-smith v. Tabor*, 5 Bush, 105; loan bond, year elapsed after adjudication; surety relieved. The power of a court to take a bond having the force of a judgment for a loan is taken for granted.

¹³ *Haddix's adm'r v. Chambers*, 5 Bush, 171.

reinstate his demand; but if a year has elapsed in the mean time, he can no longer hold the replevy surety.¹⁴

The bar of one year given by the statute may be waived by a writing signed by the sureties; in which case an execution may be issued against them after the year.¹⁵ And this limitation does not enure to a surety on the original contract against whom judgment is rendered along with the principal, and who joins with the latter in giving a replevin bond.¹⁶

Another section of the statute guards against the release of the surety in a judgment or bond, having like effect, where the record or bond is destroyed or lost before his discharge by lapse of time, and until after its re-entry or restoration.¹⁷

A replevin bond may be taken by the sheriff who has levied a *fiery facias*, and has property in his hands, though the return day have passed, and it is a valid statutory bond.¹⁸

The Criminal Code of Practice allows the replevying of fines in the same manner as civil judgments for money are replevied.¹⁹ The Constitution confers upon the Governor the power to reprieve. The common law rule, which relieves a surety from the burden when time is given to the principal without his consent, does not bind the Commonwealth; at least, not so as in the case of the respiting of a replevied fine to discharge the surety.²⁰

A forthcoming bond, given for goods exempt from execution, may be enjoined in equity; and though the case in which it was so held arose before the Code of 1854, this must still be the law.²¹ The execution of the bond is not a waiver of the exemption, nor does it work an exemption. But a third party, who, being in possession, gives a forthcoming bond for chattels, is estopped by the recitals therein from setting up his own ownership of the goods against the enforcement of the bond.²²

¹⁴ Newman v. Hazelrigg, 1 Bush, 412.

¹⁵ Prather v. Hall, 6 Bush, 185. There is some inconvenience in allowing the right to an execution to depend upon a writing *in pais*, not known to the law.

¹⁶ Millikin v. Dinning, 6 Bush, 646.

¹⁷ Gen. Stat., Ch. 104, Sec. 18.

¹⁸ Savings Institution v. Chinn's adm'r, 7 Bush, 539.

¹⁹ Crim. Code of Practice, Sec. 305.

²⁰ Nall v. Springfield, 9 Bush, 673.

²¹ Perry v. Hensley, 14 B. M. 475.

²² Sparks v. Shropshire, 4 Bush, 550.

Bonds having the force of a judgment, and other bonds intended to relieve property from seizure, are often signed by the sureties in blank, and afterward filled up by the sheriff. It was intimated in an early case that bonds thus completed are valid, if there was an understanding that the blank should be filled with a bond of a certain character, and if blunders and mistakes occurred in filling it out the surety could not complain.²⁸

SEC. 154. OTHER JUDICIAL BONDS—VALIDITY. The practice laws of Kentucky swarm with bonds, aside of those already discussed. There is the bond for costs, demanded of non-residents and corporations when plaintiffs;¹ the bond to obtain a provisional remedy (that is, an order of arrest, order of delivery, order of attachment or injunction);² the bond or recognizance of bail;³ the defendant's bond to retain goods against an order of delivery,⁴ or levied upon under attachment;⁵ the bond to discharge an attachment;⁶ a bond in the nature of an injunction bond, which the court may demand when transferring a suit at law to the equity docket upon an equitable defense;⁷ an appeal bond, given when a justice's judgment is appealed from;⁸ a supersedeas bond given upon an appeal to the Court of Appeals;⁹ a bond to relieve from arrest in bastardy proceedings,¹⁰ and the bond in the same proceedings to secure the child's maintenance, after paternity is established;¹¹ indemnifying bonds to officers levying an attachment or execution;¹² bonds to secure to infants, etc., the proceeds of the sale of lands;¹³ refunding bonds to defendants

²⁸ Griffith v. Com'th, for Clark, 5 J. J. Mar. 318. Since in Kentucky every written contract (other than bills of exchange, etc.—see *infra*, Sec. 157) has been raised to the dignity of a sealed instrument, the common law rule against leaving and filling blanks in specialties upon parol authority has fallen to the ground.

¹ Code of Practice, Secs. 21, 616, 621.

² *Ibid.*, Secs. 154, 198, 240, 251, 252,

184, 185, 278.

³ *Ibid.*, Sec. 168.

⁴ *Ibid.*, Sec. 188.

⁵ *Ibid.*, Sec. 214.

⁶ *Ibid.*, Secs. 221, 222.

⁷ *Ibid.*, Sec. 14.

⁸ *Ibid.*, Sec. 718.

⁹ *Ibid.*, Secs. 748, 749.

¹⁰ Gen. Stat., Ch. 7. Secs. 8, 5.

¹¹ *Ibid.*, Secs. 5, 10.

¹² Code of Practice, Sec. 641.

¹³ *Ibid.*, Sec. 493, etc.

constructively summoned;¹⁴ claimant's bonds under execution or distress, etc.¹⁵

Bail bonds differ in one respect from all others. A reenactment of the well-known Statute of Ease and Favor, of Henry VI, forbids the sheriff from exacting or even accepting any other bond than the ordinary bail bond from a person under arrest as the price of liberty; any other obligation given under such circumstances is void.¹⁶ Bail, under the Code, undertakes only that "the defendant shall render himself amenable to the process of the court" (upon the judgment). When another covenant, such as "that the defendant shall perform the judgment of the court," is substituted, it will not be enforced.¹⁷ Even where such a covenant is added to the ordinary bail bond, the instrument is void *in toto*.¹⁸ And so is a bail bond taken by the jailor, instead of the sheriff, in cases where the power is not conferred on the jailer.¹⁹

The rule as to other bonds given in the course of a proceeding in court is this: Where the obligors are compelled to give the bond by unlawful process, *e. g.* by the levy of an execution from a court not having jurisdiction, it is tainted by the illegal consideration, and not binding;²⁰ but any other bond, by the giving of which the obligors obtained their object for the time being, is good as a "common law bond" enforceable by action, though by reason of some irregularity the summary remedy allowed by statute on many of these bonds be not available.

In the leading case the putative father, convicted in a bastardy proceeding, had been released from custody by giving a bond with surety, payable to the guardian of the child, instead of one naming, according to the law of that time, the Governor

¹⁴ Code of Practice, Sec. 410.

¹⁵ *Ibid.*, Sec. 645.

¹⁶ Gen. Stat., Ch. 100, Sec. 14.

¹⁷ *Lexington & D. R. R. Co. v. Barbee*, 1 Metc. 384.

¹⁸ *Shuttleworth v. Levi*, 18 Bush, 195. In an old case the sheriff by reason of a former *fi. fa.* took a bond not in any statutory form from a de-

fendant who was in the custody of the jailer for another debt; it was held that the statute of Ease and Favor did not apply. (*Curry v. Duncan*, 3 Bibb, 462.)

¹⁹ *Commonw'lth v. Roberts*, 1 Duv. 199. Bail in a criminal case; but the reasoning reaches a civil arrest.

²⁰ *Florraine v. Goodin*, 5 B. M. 111.

of Kentucky as obligee. The judgment on motion rendered by the County Court having been reversed for this irregularity, an action at law was brought by the obligee, and was sustained on the ground that the bond was given on a good consideration, and that no public policy forbade its enforcement.²¹ In short, it was a "good common law bond." And that such a bond is payable to the Commonwealth (or formerly to the Governor) does not prevent its being used as a "common law bond." And so where a claimant of attached goods, *not* in possession, gave the bond which under the Code (old 235, now 214) one in possession may give, it was not thought to prevent even a summary enforcement.²² Where a bond in the shape of a replevy bond, a plain obligation for debt, interest, and costs, with interest on the whole, payable in three months, is given under an attachment by the defendant and a surety, there being no misrepresentation, and the levy is thereby discharged, the bond has served the end aimed at, and is a good common law bond.²³ The insertion of more onerous conditions than the law required in an injunction bond does not vitiate it, as far as its conditions are based on the law.²⁴

But the court went further: Where the claimant of attached goods offered a forthcoming bond, under Section 235 (now 214) of the Code of 1854, which would have left him free to contest the ownership of the thing levied on, but the sheriff refused to deliver it unless he would sign a bond to discharge the attachment under Section 243 (now 222), by which he became answerable for the judgment to be rendered in the action at all events, he was not allowed to set up these facts in answer to the attachment creditor's suit, it being admitted that

Where the friend of one arrested on Sunday on a bail writ gave her own note for the debt, such note is the result of duress and void. (*Moore v. Hagan*, 2 Duv. 437.)

²¹ *Thompson v. Buckhannon*, 2 J. J. Mar. 116 (1829), after *Thompson v. Commonwealth, etc.*, 4 Mon. 484, reversing the judgment on motion.

²² *Oppenheimer v. Riley*, 6 Bush, 118, 121; see also *Roman v. Stratton*, 2 Bibb, 199.

²³ *Hess v. Bamberger*, MS. Op., October, 1857; see *Stanton's Code of 1854*, note to Sec. 233.

²⁴ *Johnson v. Vaughn*, 9 B. M. 217 (though the extra conditions here were really unmeaning).

he had not been deceived as to the bearing of the bond; his only remedy would be an action against the sheriff.²⁵

Where a bond to discharge an attachment was signed by one surety in the belief that another name appearing on it as that of a surety was genuine, the former was held bound, though the signature of the other, upon the plea of *non est factum*, turned out to be unauthorized or forged. It was said that the sheriff in taking the bond acted more as the agent of the obligors than of the plaintiff, and that the latter should not suffer loss through the sheriff's neglect.²⁶ The case seems to be overruled, as will be shown in Section 157.

Any bond in judicial proceedings may, however, be handed by the surety to the principal, or to some attorney in the case, as an escrow, with instructions not to deliver it to the clerk, except on some condition, such as that other persons shall also join in the bonds. But if such bond is delivered to the clerk or other official, without the knowledge on his part, or on the part of those to be secured, of such condition, it becomes binding on the signer or signers, if the principal gets the relief or forbearance to obtain which the bond is executed.²⁷

SEC. 155. THE SAME BONDS—CONSTRUCTION AND EFFECT. The form of the various bonds is given in the Code or General Statutes with more or less fullness; and in some cases a clause is added defining what the liability of the bondsmen shall be, and when it shall become final. The meaning of several of these bonds has also been settled by judicial construction.

1. *Bonds to Obtain an Order of Attachment.* The bondsmen bind themselves to pay damages, etc., "if the order be wrongfully obtained." Whether it was wrongfully obtained "is only determined by the final judgment in the action."¹ The right of action on the bond does not accrue until the attachment is discharged by the final judgment of the court.²

²⁵ Hazelrigg v. Donaldson, 2 Metc. 445.

²⁶ Boyd v. Cook, 16 B. M.

²⁷ Carswell's executor v. Rennick & Wood (an official bond), 7 J. J. Mar. 281, and following it, Whitaker v.

Crutcher, 5 Bush, 621 (a supersedeas bond.)

¹ Kaye v. Kean, 18 B. M. 889, 846 (*arguendo*).

² Nolle v. Thompson, 8 Metc. 121.

Where a suit goes off otherwise than upon the merits, or is dropped by the plaintiff, and the attachment thus falls with it, its wrongfulness is not established, and would remain open to be shown or disproved in the suit on the bond.³ “Wrongfully” does not mean maliciously, or without probable cause; it means without a good cause. (No cases have been reported on bonds given to obtain an order of arrest; the same principles apply to them as to bonds to obtain an attachment.) As to the measure of damages on these bonds, the following rules have been laid down :

Attorney’s fees and costs which the defendant has paid, or bound himself to pay in the successful defense of the grounds of attachment, can be recovered back; not, however, fees for defending the action of debt on its merits.⁴ Where the action is unfounded, but the ground of attachment is truly alleged and not denied, and the defense is directed wholly to the former and not to the latter, the costs and counsel fees can not be recovered on the bond.⁵

Consequential damages, such as loss of credit or of business, or mortified feelings, can not be considered in the suit on the bond;⁶ but the injury to or deterioration of the property attached, and the value of its use during the time, and what the defendant lost by being deprived of that use, may be shown.⁷

A recovery of damages in a suit for maliciously prosecuting the attachment, and payment of such recovery, form a complete bar to the action on the bond; for whatever can be recovered on the bond is recoverable in such an action of tort.⁸

2. *Injunction Bonds.* Injunctions to stop proceedings upon a judgment are now quite rare; those to prevent a sale or re-

³ Cooper v. Hill, 3 Bush, 219, and next case.

⁴ Pettit v. Mercer, 8 B. M. 51. Shultz v. Morrison, 3 Metc. 98 (what the services are reasonably worth is not the measure of recovery); Trapnall v. McAfee, 3 Metc. 34.

⁵ Johnson v. Farmers Bank, 4 Bush, 283. Somewhat harsh, as the defend-

ant was absent, and without the attachment could not have been sued at all.

⁶ Pettit v. Mercer, *ubi supra*.

⁷ Carpenter v. Stevenson, 6 Bush, 259; where a contractor was deprived of the use of stone from which to build a house.

⁸ Hall v. Foreman, 82 Ky. 505.

lease a levy under execution not very frequent. The form and penalty for the bond is indicated by Section 278 of the Code of Practice. In all other cases the form and penalty are both within the discretion of the court or judge granting the injunction; but where no other form is prescribed, the bond is "to the effect that the party giving it will pay to the party enjoined such damages as he may sustain, if it be finally decided that the injunction ought not to have been granted."

The plaintiff in the injunction suit can by a voluntary dismissal prevent the final decision, upon which his bond, by its terms, becomes forfeited. But where a bond in the above form had been given in a suit to vacate a judgment, and the petition was afterward dismissed for failure of the petitioner to revive it in due time after the defendant's death, the court deemed this equivalent to a decision on the merits.⁹

A suit was lately brought against two holders of county bonds to enjoin the collection of a tax intended for the payment of those bonds; an injunction bond was executed, and an injunction granted. Two other bondholders made themselves parties defendant, and, defending for themselves and all others, succeeded in having the injunction granted at the institution of the suit dissolved and the suit dismissed. It was held, in a suit on the injunction bond, that damages might be recovered for the benefit of all the holders of county bonds, and not only of those who were originally, or afterward became, parties to the suit.¹⁰

The counsel fees which the defendant expends in defeating

⁹ Pugh's adm'rx v. White, 78 Ky. 210, distinguished from Cooper v. Hill, *supra*, n. 3, where the attaching plaintiff was not to blame, but following an old decision on an appeal bond (Harrison v. Bank of Kentucky, 3 J. J. Mar. 875), conditioned "if the judgment be affirmed," and where the appellant had, by withdrawing the appeal, prevented an affirmance. In October, 1857 (Gerber v. Kromer, MS. Op.), the Court of Appeals had inadvertently given a

literal construction to the injunction bond, and refused relief, because the injunction suit was dismissed, and nothing had been "decided." It was held also in the first named case that the recovery could not be diminished, on the ground that the lien of the execution levy remained in force; the judgment plaintiff having the right to go on that security and on the bond.

¹⁰ Alexander v. Gish, 10 Ky. Law Rep. 990.

an injunction can not generally be recovered on the bond, for the same legal work would have to be rendered by the lawyer in defeating a decree for a perpetual injunction at the end of the suit, if the preliminary injunction had not been granted.¹¹

The bondsmen can not be held for more than they undertake by the bond, though under the law a better bond ought to have been given.¹² On the other hand, an injunction bond given by an executor to stop the collection of a judgment *de bonis testatoris* was construed as not making him and his sureties liable for the debt beyond the available assets.¹³

As shown heretofore, conditions not required by law do not vitiate the bond; and it was even held, under a statute not requiring the obligors in a bond for enjoining a judgment to bind themselves for the damages on dissolution, that they would nevertheless be bound if the bond happened to provide for damages.¹⁴ But where the recitals of the bond go beyond the order of injunction, the recovery will be restricted accordingly; there is no consideration for any further obligation.¹⁵

Where the defendant in the injunction has it dissolved on motion for informality in the bond, he is thereby estopped

¹¹ *Burgen v. Sharer*, 14 B. M. 497; *New National Turnpike Co. v. Dulaney*, 86 Ky. 516. In the latter case this illustration is given: If a widow, justly suing for her dower, should in her suit wrongfully enjoin for waste, the defendant might recover his counsel fees expended in defeating such injunction.

¹² *Ashby v. Tureman*, 3 Litt. 6; judgment enjoined; bond to pay "damages (*i. e.*, per cent awarded on dissolution) and costs;" without providing for judgment; *Ferguson v. Tipton*, 1 B. M. 28, followed it; *Ashby v. Chambers*, 4 Dana, 437—bond for "damages and costs;" no damages awarded; none can be recovered.

¹³ *Mahan v. Tydings*, 10 B. M. 351. The damages and costs were not al-

luded to, and must stand on the same footing as the judgment. The condition of the bond was: "If said Lucy *as* executrix shall pay." This case overrules or very narrowly "distinguishes" *Hopkins v. Morgan*, 7 Mon. 1; condition of bond, "now if said Morgan, executor aforesaid, shall pay," which was deemed personal to him, and where a majority of the court held the bondsmen liable, and overruled a plea of *plene administravit*.

¹⁴ *Harrison v. Park*, 1 J. J. Mar. 173. The point is much weakened by the court's expression of belief, that the law in force does make the sureties liable for the damages.

¹⁵ *Hanley v. Wallace*, 3 B. M. 184, 193.

from taking any benefit under it.¹⁶ And where the defendant has yielded in the matter sought in the petition, the complainant has "prosecuted the injunction with effect," and if it be dismissed, his bond conditioned that he shall so prosecute it is not broken.¹⁷ On the contrary, where a judgment defendant was so far justified in enjoining that the court of equity in dissolving the injunction awarded no damages and gave him costs, his bond was yet enforced so as to satisfy the enjoined judgment.¹⁸ Where one of two defendants in a judgment rightfully has it enjoined as against himself, and gives bond accordingly, he can not be made liable for the amount through the mistake of the clerk who applies the injunction to the judgment against both, and through the consequent dissolution of the injunction as to the other defendant.¹⁹

3. *Bonds upon Orders of Delivery.* The order of delivery, as a provisional remedy in an action for the recovery of specific chattels, takes, under the Code, the place of the writ of replevin in the more modern practice before the Code. The bond which the plaintiff must give to the sheriff before the order of delivery is executed reads to the effect, "that the plaintiff shall duly prosecute the action and . . . perform the judgment of the court therein by returning the property, if, etc., and pay such sums . . . as may be adjudged against him, etc., and the costs, etc." (Section 184, old 211.) If no "sums" are adjudged in the original action, none can be recovered in the suit on the bond;²⁰ nor can the value be recovered if there was no judgment for a "return."²¹ Where a third party intervenes in the action for the possession of the chattel, and it is adjudged to be his, the bond may be enforced for his benefit.²²

¹⁶ *Watts v. Sanders*, 10 B. M. 372. Complainant had enjoined a note given for land for defect in the title; the defect was removed, whereupon the injunction was dissolved, but this affected the damages only.

¹⁷ *Cobb v. Curts*, 4 Litt. 235 (*arguendo*).

¹⁸ *Hunt v. Scobie*, 6 B. M. 464.

¹⁹ *Sims v. Canary*, 9 Dana, 369. See

also as to effect of injunction bonds, *Keel v. Ogden*, 3 Dana, 109 (part of debt enjoined); partial dissolution, *Davis v. Harrison*, 1 A. K. Mar. 514.

²⁰ *Kenley v. Commonwealth*, 6 B. M. 583, applicable, though decided before the Code.

²¹ *Wall v. Humphreys*, 4 Dana, 209, also before the Code.

²² *McGlasson v. Bradford*, 7 Bush,

The defendant to an "order of delivery" may retain the chattels demanded by giving bond "in double the value of the property, to the effect that the defendant will perform the judgment of the court in the action." (Section 188, old 215.) This covers the costs adjudged in it,²³ but not a judgment for other matters contained in the same petition, in which possession of the chattel and damages for its detention are claimed;²⁴ and on the same principle, and considering that the penalty of the bond is governed by the value of the chattels retained, a judgment for other chattels not bonded, but previously eloiigned, seems not to be covered. If an animal should die while in possession of either party under the bond, the possession being unlawfully obtained, as is shown by the judgment for a "return," such death, though without the fault of the party, is no excuse against compliance with the bond.²⁵

4. *Bonds to Relieve against Attachment.* Under Section 214 (old 235) a person found in possession of attached property may have it redelivered to him, that is, he may in fact retain it, upon giving bond, in "double the value of the property, that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming and subject to the order of the court." Section 216 (old 237) adds: "In any proceeding on this bond it shall not be a defense that the property was not subject to the attachment." This means only, that a claim to the ownership of the property by a third person, or a claim of exemption by the defendant, must be litigated first; should such litigation result unfavorably to the attaching creditor, no order of the court for the forthcoming of the property will be made.²⁶ And where prop-

250(1870); though the stranger might, under Sec. 191 (old 218), have claimed a bond to himself.

²³ Galloway v. Bethume, 6 Bush, 118.

²⁴ McKee v. Pope, 18 B. M. 548, 556.

²⁵ Scott v. Hughes, 9 B. M. 104; so held in the original actions of replevin.

²⁶ Schwein v. Sims, 2 Metc. 209. Here the principal in the bond paid it into court, and reclaimed it successfully as the owner of the thing attached, the bond not estopping him. In Halbert v. McCulloch, 3 Metc. 456, under the steamboat attachment law, Sec. 268 of old Code, a bond similar to that under new Section 214 was

erty released under such a forthcoming bond has been sold under a previous execution, which was recognized by the levy of the attachment, and brought the full value, which was exhausted by the execution, the bondsmen, under a rule against them, were not held to pay more than nominal damages.²⁷

A case decided in 1869 reverses a judgment making a rule absolute against the obligors "to pay the money due by them into court" without giving them an opportunity (which they did not claim in responding to the rule) to return the property. A judgment to sustain the attachment and subject the property had been directed by the Court of Appeals on a previous reversal; but it seems not to have been entered before the rule on the bond was issued; otherwise it is hard to say what the court meant by saying, "The proceeding should have been such as to allow the defendants an opportunity of litigating the facts of the existence and extent of their liability."²⁸ The claimant of attached horses having given a bond in this form, and the horses being held bound by the attachment, is not excused by the accidental death of a horse.²⁹

By giving bond under Sections 221 and 222 (old 242 and 243) all questions as to the validity of the grounds of attachment and as to the ownership of the things levied upon is waived; the bondsmen become liable for the judgment at all events.³⁰ But when such judgment is replevied it is considered as being "performed," and the bond is discharged.³¹

5. *Claimant's Bonds.* The levy or sale of chattels under an execution may be suspended by the execution of a "claimant's bond" (Section 645, old 713, of Code), to the effect "that if it shall be adjudged that the property or any part of it is subject to the execution, he will pay to the plaintiff the value of the property so subject, and *ten per cent* thereon, not exceeding the amount due on the execution and *ten per cent* thereon."

construed as only binding the obligors for the value of the attached defendant's *interest* in the attached boat.

²⁷ Hayman v. Hallam, 79 Ky. 389.

²⁸ Oppenheimer v. Riley, 6 Bush, 118, 122.

²⁹ Dear v. Brannon, 4 Bush, 471; see n. 25; case quoted as precedent.

³⁰ Hazelrigg v. Donaldson, 2 Metc. 445; Inman v. Stratton, 4 Bush, 445.

³¹ Gray v. Merrill, 11 Bush, 638

The claimant is not liable on this bond, if he have an equitable interest in the chattel levied upon, leaving no salable interest in the execution defendant.³² And so the landlord, or a surety substituted to his lien, may stop an execution sale by such a bond and defeat a recovery thereon to the extent of the lien.³³ If the judgment be replevied, it is as much as paid, but the claimant's bond is still enforceable for the penalty of ten per cent.³⁴ As the execution defendant's surety in the forthcoming bond can not deny that the latter owns the goods, should he claim the goods and give a "claimant's bond," judgment thereon must go against him.³⁵

6. *Indemnifying Bonds.* These bonds have already been referred to as to their effect in shielding the officer holding the writ.³⁶ It may be added that, in the absence of a clear statute to that effect, a sheriff can not plead the obtention of an indemnifying bond to an action for levying a wrongful *attachment*.³⁷ Suit may be brought on the bond by the defendant himself if the property levied on is exempt from execution;³⁸ and the holder of an equity in, or of, a lien on the goods may recover on it.³⁹ In a case in which the officer had sold more of the property (a drove of hogs) than necessary to satisfy the execution, and actually paid too much to the plaintiff, the surety in the indemnifying bond was held for the whole amount, including the excess.⁴⁰

7. *Bond or Recognizance of Bail.* No cases on the construction of the civil bail bond have been reported since the enactment of the first Code of Practice. The liability of bail in criminal cases depends mostly on points of criminal law foreign to this work. We may, however, refer to some decisions

³² *Williams v. Smith*, 4 Bush, 540, overruling *Watson v. Gabby*, 18 B. M. 660, and referring to Sec. 484 (now 449) of the Code, under which judgment on motions must be rendered "according to law and the rules of equity."

³³ *Smith v. Wells' administratrix*, 4 Bush, 92.

³⁴ *Southern Bank v. White*, 1 Duv.

290.

³⁵ See *supra*, Sec. 153, n. 22. *Sparks v. Shropshire*, 4 Bush, 550.

³⁶ See *supra*, Sec. 49, n. 2.

³⁷ *Lewis v. Mansfield*, 78 Ky. 460. See C. P., Sec. 211.

³⁸ *Dixon v. Bacon*, 3 Bush, 534.

³⁹ *Watts v. Cook*, 2 Bush, 141.

⁴⁰ *Secrets v. Markwell*, 11 Bush,

816.

as to what excuses non-appearance. Where the accused was in the Federal army and unable to obtain a furlough, or had been arrested by a military officer of the United States and was held in custody at the time when he should have appeared in court, his bail was excused.⁴¹ That he had been arrested in another State and held in custody there was no excuse, for the bail ought not to have permitted him to go there.⁴² Being in custody under the laws of Kentucky on another charge should certainly be deemed a good excuse, but it was disallowed on very narrow grounds in two cases where the arrest took place in another county, on the very day when the accused should have appeared.⁴³

8. *Refunding Bond.* No case is reported arising on a bond, under Section 410 (old 440) of the Code, which the plaintiff must give to a defendant constructively summoned before taking a judgment applying the latter's property to his demand. But it has been said incidentally that a purchaser under such a judgment, who may lose the benefit of his purchase upon a vacation or avoidance of the judgment, has no right to proceed upon such a bond.⁴⁴

9. *Appeal and Supersedeas Bonds.* The bond which the appellant to the Court of Appeals (or Superior Court), in order to obtain a stay of proceeding, must *cause to be* executed by one or more sureties is "to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged . . . on the appeal; also, that he will . . . perform the judgment appealed from if it should be affirmed, and any judgment . . . which the Court of Appeals may render or order to be rendered by the inferior court, not exceeding in amount . . . the original judgment and all rents, or hire, or damages to property, during the pendency of

⁴¹ Commonwealth v. Ferry, 2 Duv. 388. Commonwealth v. Webster, 1 Bush, 616. Whether the military order was lawful or unlawful is immaterial, it being *vis major*.

⁴² Withrow v. Commonwealth, 1 Bush, 17.

⁴³ Alguire v. Commonwealth, 8 B. M. 849; Kirby v. Commonwealth, 1 Bush, 113. It was said in the former case that the accused showed by his presence in the other county that he would not and could not appear.

⁴⁴ Salter v. Dunn, 1 Bush, 311.

the appeal, of which the appellee is kept out of possession by reason of the appeal.”⁴⁵

Unless a *supersedeas* is issued and served, and the proceedings are thus lawfully stayed, the bond does not take effect, and the sureties are not liable.⁴⁶

Under the present law the bond is too definite to leave much room for construction, and the earlier decisions have become obsolete. Where a decree dissolving an injunction is appealed from, the bondsmen are liable only for the costs and “damages” adjudged below, and the costs and damages on the appeal; the injunction bond alone must be looked to as security for the judgment at law that has been enjoined.⁴⁷

As far as the bond is broken by the appellant’s failing to perform the judgment when affirmed, the action accrues at once without awaiting the result of an execution against the principal.⁴⁸

The “damages to property” secured by the bond do not cover depreciation of land;⁴⁹ nor is there any thing in the bond to cover the loss of interest on a fund, the distribution of which is suspended.

Where a judgment is superseded, while the defendant’s property is under the lien of an execution on a replevy bond, and this lien which secures the replevy surety is thus destroyed, the latter has his recourse by subrogation on the supersedeas bondsmen.⁵⁰

10. *Bastardy Bonds.* Under the present law the County Court can not require a defendant, who has already given a bond before judgment, to give a new bond after judgment of paternity. Hence it is no defense to the former bond (that the defendant will appear *and* perform the judgment, etc.)

⁴⁵ C. P., Sec. 748 (old 887).

⁴⁶ *Watson v. Needham*, M. S. O., 1871, based on *Reed v. Lander*, 5 Bush, 598 (no damages on affirmance, unless a supersedeas is served), and followed by Superior Court in *Barrett v. Barrett*, 11 Ky. L. R. 307.

⁴⁷ *Steele v. Wilson*, 9 Bush, 699.

⁴⁸ C. P., Sec. 724 (old 847).

⁴⁹ *Dills v. Cecil*, 4 Bush, 579—a case of appeal from Quarterly to Circuit Court, where this is the only covenant; held incidentally and as matter of course.

⁵⁰ *Watkins v. Suter*, 11 Ky. L. R., 307 (Superior Court).

that he was present in court and willing to surrender his body, and that the court refused to take him in custody.⁵¹

That the mother has removed herself and child from the State is no defense against paying subsequent installments.⁵²

(Bonds for costs are omitted, as incidents of practice. Bonds required of guardians and committees in proceedings for the sale of lands are discussed with "Bonds of Fiduciaries.")

SEC. 156. BONDS OF FIDUCIARIES. A bond or covenant to secure the faithful conduct of an executor, administrator, committee, or guardian is governed by the maxim already stated, that it stands as a good "common law bond," when not taken according to statute; and a trustee's bond may be valid, though taken by a court having no jurisdiction; if in either case by color of the void orders following upon the execution of the bond the property of the beneficiary came into the hand of the acting fiduciary; for instance, of a person acting as guardian, but not being such in law, because a former guardian had not been removed.¹

The wards may include in a chancery suit against their guardians, and the distributees or legatees in such a suit against the executor or administrator, the sureties of one or of the other, in the first instance, and before a balance has been shown in the hands of either.² This is said to be for the benefit the sureties, as it gives them an opportunity to contest the account.

1. *Guardian's Bond—Extent of Liability.* By his bond or

⁵¹ Commonwealth v. Douglass, 11 Bush, 607.

⁵² Commonwealth v. Williams, 1 J. J. Mar. 308. The object of the proceeding is to compel the father to do his duty, not to relieve the public.

¹ Cotton's g'd'n v. Wolf, 14 Bush, 238. The infant had no hand in the illegal appointment, and should not suffer by it. In the older case, Edmonds v. Morrison, 5 Dana, 223 (1837), the sureties on the guardian's bond were held, though his guardianship was so clearly against law as to

make his receipt for the ward's moneys void. Clay's adm'r v. Edwards' trustee, 84 Ky. 548, surety on trustee's bond void, though the court taking the bond, not having the parties in interest before it, had no jurisdiction to appoint him. And so the Superior Court decided on the bond of a committee who qualified before an inquest had been held on the lunatic. (Ogilvie v. Commonwealth, 11 Ky. L. R. 905.)

² Carroll v. Connet, 2 J. J. Mar. 195, 199; Hutchcraft v. Shrout's h'rs, 1 Mon. 206.

covenant the guardian is "faithfully to discharge the trust of a guardian." The bond is thus co-extensive with the trust, and the sureties can defend on any ground on which the guardian might defend.³

The guardian can not lawfully sell real estate without the judgment of a court. It is true, that if he does sell, the ward coming of age can ratify the act and look to him for the proceeds, but only to him personally, not on the bond.⁴ But if by giving a new bond he obtains a judgment of sale and the proceeds are paid to him, the sureties on the bond given at the qualification in the County Court are bound, though no money could have come to the guardian's hands without the new bond.⁵ As between themselves the surety in the County Court and the sureties in the Circuit or Chancery Court must divide the net loss.⁶

Where a guardian upon the execution of bond gets the proceeds of lands sold by court for reinvestment as a "special commissioner," there being interests in remainder, his sureties on the special commissioner's bond will not be excused because the money did not come into his hands exactly in the manner contemplated in the bond and accompanying orders, if he was authorized to receive it; for instance, when it was paid to him by the purchasers, while the order and bond directed that the commissioner making the sale should collect it and pay it over to him.⁷

Only "ordinary diligence" is required from a guardian. Yet in a late case a pretty severe test was applied. For the child of a Union soldier, having no other estate than claims

³ Follows from authorities given in note 2.

⁴ Withers v. Hickman, 6 B. M. 292; Taylor v. Taylor, *Ibid.* 559. These cases were decided under the act of 1818 (see *supra*, Sec. 74), which did not render the sale of land by order of the Circuit Court void for want of bond. Elbert v. Jacoby, 8 Bush, 542, was decided under a modern statute, under which the bond in the

Circuit Court is indispensable for passing the title.

⁵ Elbert v. Jacoby, just quoted. Since that case the Code has been enacted, requiring *two* sureties in the Circuit Court. *Quære*: Do they count as one or as two when it comes to distribution?

⁶ Taylor v. Hemingray, 81 Ky. 158.

⁷ Boaz's adm'r v. Milliken, 82 Ky. 634.

for bounty and pension, a guardian was appointed, who applied to the departments at Washington for the allowance of these claims, but resigned before they were acted upon. A new guardian was then appointed, who for two years made no inquiry as to the progress of the claims. He found then that the former guardian, who was insolvent (and must have given a worthless bond), had collected the bounty and pension money by the aid of false certificates and untrue testimony, the bulk of it more than ten months after the date of resignation. A majority of the court (Judge Pryor dissenting) deemed this gross negligence, and held him liable on his bond.⁸ And where a new guardian sued his predecessor alone for the balance in the latter's hands, without suing his surety with him, and allowed the latter to be discharged by lapse of time, it was held gross neglect and he liable on his bond for the loss.⁹

2. *Administration and Executor's Bonds.* An administrator (unless "with the will annexed") has no power over the real estate, nor over any rents arising from descended lands after the death of the intestate. An executor or administrator with the will annexed may have such power under the will. While the bond of the former only undertakes that he "will well and truly administer . . . the goods, chattels, credits, and effects that may come to his hands," etc., and will "make . . . distribution of any surplus money, effects, and *rents* which may come to his hands . . . by color of his office,"¹⁰ the bond prescribed for the latter has in place of the latter clause the words: "and the proceeds of any sale, and the *rents* and profits of any estate which may come to his hands, etc., by color of his office, which the will empowers him to sell."¹¹ The last words are somewhat awkward. The word "rents" has given some trouble. Often the executor or administrator, with the acquiescence of the heirs, attends to their lands and collects their rents. If the

⁸ *Hemphill v. Lewis*, 7 Bush, 216. *Harris v. Berry*, 82 Ky. 187, where a guardian was not made liable for not suing a Missouri executor and his sureties promptly, decides no law point, but simply draws the conclu-

sion of fact that the guardian did the best that could have been done for his wards.

⁹ G. St., Ch. 39, Art. II, Sec. 9.

¹⁰ *Ibid.*, Art. I, Sec. 5.

¹¹ *Ibid.*, Art. I, Sec. 5.

will gives him no such authority, he does not exercise a trust, but a private agency only, and his bondsmen can not be bound for him. The words in the bond which have crept from an old into the new statute are construed to refer only to such rents as go to the administrator, either by arising from an estate *pur autre vie*, which under the present law is personal estate after the death of the first taker, or by apportioning the gale of rent, unaccrued at the decedent's death, or the rents and profits of an estate for years,¹² or rents which the will expressly authorizes the executor to collect.

Where two or more executors, etc., give a joint bond they become thereby liable each for the *devastavit* of the other, which they would not be independently of the bond; and the responsibility of the executor, who has not meddled with the fund, for the doings of the other is that of a surety only, like that of those who sign the bond as sureties *eo nomine*.¹³

A very late decision in the Court of Appeals, affirming one of two late judgments in the Superior Court, defines the time when the action on the bond on behalf of a distributee accrues: namely, in nine months after qualification, and whether the administrator's account be then settled or not.¹⁴ The point is so held with a view of the running of the Statute of Limitations; but it would in many cases be impracticable to maintain a suit at so early a time.

To "administer" the estate means to pay out of it debts and expenses; hence the form of executor's bond given by the statute since 1852 secures beyond a "faithful administration also the payment of legacies and the distribution of any surplus effects," etc., which last may come into play should the will be set aside after the assets have come to the executor's hands, or when the testator dies intestate as to any part of his estate. Should these clauses in the bond be omitted, the sure-

¹² *Wilson v. Unselt*, 12 Bush, 215.

¹³ *Collins v. Carlisle's heirs*, 7 B. M. 13. *Qu.*: Can such co-executor have contribution from the nominal sureties?

¹⁴ *Robinson's committee v. Elam's*

ex'r (1889), Superior Court, 11 Ky. Law Rep. 307; *Donnelly v. Pepper* (same year and court). *Ibid.* 365. The former case was affirmed in the Court of Appeals, June 19, 1890.

ties would be liable to the creditors only.¹⁵ But where an administrator, *with the will annexed*, had given the ordinary administration bond, the court intimated that his sureties would be nevertheless responsible for the proceeds of the lands sold under the provisions of the will, as these proceeds come to him *by color of his office*, and he must, by the terms of the bond given, distribute all "surplus funds" thus coming to him "to the persons entitled thereto."¹⁶

The only case in which the sureties were discharged, because the money came to the executor's hands in his character of trustee, is too plain to establish a new rule.¹⁷

3. *Counter-Bonds and New Bonds.* The General Statutes, in the chapter on Guardian and Ward, provide for additional security to be given by the guardian on demand of the court, or for *counter-security* to be given on the demand of one or more of the sureties in the original bond,¹⁸ and similarly in the chapter on Executors and Administrators;¹⁹ but in the chapter on Sureties a proceeding is given to the sureties in *all* official or fiducial bonds, by which the officer or fiduciary can be removed from his office or trust, unless he will give a *new* bond. "If a new bond is given, it shall operate a discharge of all the sureties *making the motion* . . . for the acts of the principal thereafter done."²⁰ They may even ask indemnity for their liability already accrued.

Where an "additional bond" is given, the sureties in both bonds ought to contribute as between themselves.²¹ Only those sureties in the administration bond who make the motion are thus exonerated. But the new bond can not under

¹⁵ Carr v. Bobb, 7 Dana, 417, and three older cases. These bonds are in our days almost always made out on printed forms bound together in book form, and omissions can hardly happen. The omission of that part of the bond which secures creditors does not affect the clause in favor of distributees. (Carrol v. Connet, 2 J.J. Mar. 195, 199.)

¹⁶ Mobberly v. Johnson's ex'r, 78

Ky. 273.

¹⁷ Neely v. Merritt, 9 Bush, 354. Executor was to hire out slaves and accumulate a fund for their benefit; a trust of indeterminate length.

¹⁸ Ch. 48, Art. 1, Secs. 13, 14, 15.

¹⁹ G. St., Ch. 89, Art. II, Sec. 13.

²⁰ Ch. 104, Sec. 6.

²¹ Hutchcraft v. Shrout's heirs, 1 Mon. 206.

this statute have the effect of releasing the old surety from responsibility for assets which the administrator has already converted into money.²²

In the case of a personal representative the law now says that if he "shall give a new bond when ruled to do so . . . on motion of a surety, his former surety shall not be bound for any act of his done *after* the execution."²³

SEC. 157. OFFICERS AND PUBLIC AGENTS—VALIDITY OF BOND. The surety in an official bond may execute it through an agent appointed in writing *signed by him*, and a bond loses none of its statutory character by being thus executed.¹ Nor is it any objection to an official bond accepted by the County Court and otherwise identified that the clerk failed to attest it.²

Suits upon bonds for the faithful performance of public duties are most frequently brought by litigants and other private parties who suffer from the breach of duty. The county judge, or other official, who accepts or attests the bond of a sheriff or other officer or public agent, and thus enables him to handle the money or property of such parties, is in no sense the agent of the latter, and they ought, according to the principle heretofore illustrated in the case of an attachment bond,³ not to suffer by the shortcomings of such judge or other official. In

²² *Pepper v. Donnelly*, 87 Ky. 258. Such seems to us the principal meaning of "any act of his," though it is not explained in this case.

²³ Gen. Stat., Ch. 39, Art. II, Sec. 13. It will be necessary for a full understanding of this subject to read together this and the preceding section from the chapter on Executors and Administrators, and Ch. 48, Art. I, Secs. 13, 14, 15, on the New or Additional Bonds of Guardians, with the first six sections of Ch. 104 (Sureties), in order to obtain a full survey of the subject.

¹ *Basham v. Commonwealth*, 13 Bush, 86, 41 (the bond was enforced

by motion); but an agent authorized to sign certain names to "any bond, that may by law be required of a sheriff," can not under such a power add their names to a bond given and accepted several months before. A power of attorney to sign as surety must, under a statute to be discussed hereafter, be signed by him who grants the power in person, not by another in his presence. (*Dawson v. Lee*, 88 Ky. 49).

² *Commonw'lth v. Gabbert*, 5 Bush, 438.

³ See *Cook v. Boyd*, *supra*, 155, n. 26.

fact, according to the principle established elsewhere and followed in Kentucky, as will be shown in the next section, not even the people of the State or of a county should lose their recourse on a bond by the mistake or misfeasance of the officer who received it.

It was rightly, from this standpoint, held that two sureties for a warehouse keeper, under an old tobacco warehouse law, were bound by their signatures to the consignors of tobacco, though the name of another surety, which had been forged by the principal, was on the bond before they attached their names, which could not have happened if the clerk (of the Aldermen) intrusted with the business had, according to law, insisted on causing all the bondsmen to sign their names in his presence.⁴ In this case a Kentucky decision on a bond for discharging an attachment, similarly signed, and heretofore quoted, and a case from Illinois, just then published in a law monthly,⁵ were spoken of as the only authorities in point; and these being in direct conflict, the Court of Appeals followed its own precedent as the *settled* law of the State. But three years later this authority and the precedent therein relied upon were both ignored. In a suit by an execution creditor against the sureties in the sheriff's bond for money collected and withheld, the sureties pleaded "that when they signed the sheriff's bond the name of D. V. B. was to it as surety; that they signed and acknowledged it in the presence of the County Court, which together with W. J. B., the principal, represented that said D. V. B. had signed the bond, whereas he had not signed it; that it was not his act and deed; *wherefore*, they say it is not their act and deed." This plea was held good mainly on the strength of the Illinois case, meanwhile published in the regular reports, which had before been rejected as an authority, and without any reference to the Kentucky cases.⁶ And where ten men had signed a letter of attor-

⁴Terry & Bell v. Hazlewood, 1 Duv. 104.

⁵Cook v. Boyd, 16 B.M. 556; Seely v. The People, Amer. L. Reg. for 1868; since published in 27 Illinois.

⁶Chamberlain v. Brewer, 8 Bush, 561. The writer was first impressed with the need of a Kentucky law book by the course of the court in this case.

ney, authorizing their names to be put to a sheriff's bond, and before it was used three of them had their names erased, and the other seven names were appended by the attorney named to the bond; in a suit upon it they were let off on a special plea of *non est factum*, the court saying that common prudence would have taught the county judge to look into the cause of the apparent erasure of names; as if the county judge were the agent of those who suffered from the want of a valid bond.⁷

Another great danger of loss to litigants from a worthless sheriff's bond comes through a doctrine first fully announced in 1868. One of the proposed sureties, whose name was included with six others in an order of the County Court accepting them as sureties for the sheriff on his general bond, by accident failed to sign it; the other six did sign. It was held that the bond signed by the latter alone was invalid, never having been accepted by the County Court; and as the Commonwealth could only act through the records of that court, the bond stood as if never delivered.⁸

The rule of the "good common law bond" has been, however, applied to these public bonds. Where a tobacco warehouseman with his sureties executed a bond in pursuance of a statute which had been repealed a few days before, the new statute prescribing a heavier penalty and somewhat more burdensome conditions, the bond, though payable to the Commonwealth, was enforced on behalf of a consignor of tobacco, suing in his own name for misapplied proceeds of sale.⁹ And the bondsmen of a sheriff or constable are liable for his collections, though he was not eligible.¹⁰

⁷ Bracken County Commissioners v. Daum, 80 Ky. 388.

⁸ Fletcher v. Leight, Barret & Co., 4 Bush, 303, relying on what was said in Commonwealth v. Davis, 9 B. M. 138: "Without such acceptance it was not a good statutory bond; and although, if executed to the relator, it might have been a good common law bond, it is of no avail as a bond to the Commonwealth," etc. But a declaration not averring acceptance

was there held good, because the denial should come from the defense.

⁹ Lane v. Kasey, 1 Met. 410. When the statute named a penal sum for the sheriff's bond, the insertion of too large or too small a sum did not render the bond void. (Grimes v. Butler, 2 Bibb, 182; Johnson v. Gwathmey, *Ibid.* 196).

¹⁰ Commonwealth for Harris v. Teal, 14 B. M. 29; Jones v. Gallatin County, 78 Ky. 491.

As the County Court may from time to time look into the sufficiency of the three bonds of the sheriff (State revenue, county levy, and general) and to call for additional bondsmen, it follows that the voluntary signature of such new bondsmen, recited in an order of the court, is not without consideration; they help to keep the sheriff in office, and their liability is "statutory."¹¹

Under the Revised Statutes it was the duty of the County Court to require from the sheriff, in each year, at its January or February term, a bond for the State revenue, and to remove him upon failure to give it: then, without any authority, to take an *original* bond for that purpose at a later day. Hence, where such bonds were taken later they had no statutory force, and would neither sustain a summary motion for judgment, nor raise a lien on the land of the bondsmen, though these might yet be liable in an action.¹² The General Statutes and the present Revenue Law¹³ demand this bond to be given by the first Monday in January, and they repeal by omission an act of 1869, which gave the full statutory force to a revenue bond taken after the prescribed time.¹⁴ Under this present law a County Court, being on the first Monday in January dissatisfied with the bond then offered, allowed it to be completed on Tuesday and then accepted it, but dated its order back to Monday. The sureties were allowed to impeach this record (being that of a *limited, inferior* court) by parol proof, and the summary proceedings against them were disallowed.¹⁵

Where the court, before the present statute as to bonds of Master Commissioners and Receivers,¹⁶ took a general bond from its Master Commissioner instead of a separate bond on each sale, the sureties on this general bond were held bound for a defalcation.¹⁷ And where a court extends the time within which a receiver may account for an estate in his hands upon

¹¹ Com'th v. Adams, *ubi supra*.

¹² Bush, 350.

¹³ Calloway v. Commonwealth, 4 Bush, 383; Hall v. Commonwealth, 8 Bush, 378, 382.

¹⁵ Commonwealth v. Yarbrough, 84 Ky. 496.

¹³ G. St., Ch. 92, Art. VIII, Sec. 3; B. and F. St., p. 1072.

¹⁶ Act of 1874; B. and F. G. St., p. 989, under Ch. 75; as to receivers of Louisville Ch'y. Court, O.P., Sec. 786.

¹⁴ See Grundy v. Commonwealth,

¹⁷ Ellis v. Carr, 1 Bush, 527.

his giving bond with surety, such bond is not unlawful, but is an allowable method of securing the fund which is constructively in court.¹⁸

Alterations or erasures in an official bond, after it is signed, stand on the same ground as in any other written instrument.¹⁹ (See a later section on this subject.)

SEC. 158. OFFICIAL BONDS—EXTENT OF LIABILITY. To construe an official bond is little else than to define the officer's duties. Where the Commonwealth at large, or on behalf of the people of a county, is the party in interest, it stands to the sureties pretty much in the attitude of the obligee in an ordinary bond between man and man. Yet it is no defense to the sureties that the loss could happen only through the unlawful neglect of other officers of the Commonwealth, who should have kept their principal in check, sued him while solvent, etc.¹ Nor is it a defense that after the bond was given the legislature has increased the duties of the principal or his opportunities to handle money; thus, where a special county tax was authorized after the sheriff had given his county revenue tax, the sureties were held bound for its proceeds.²

The sheriff gives three bonds: the general bond, mainly to secure litigants, the State revenue bond, and the bond for the levy and "public dues" of the county. Where a railroad tax is voted by the county, its proceeds as "public dues" are secured by the last of these bonds; the sureties on the first named bond, notwithstanding its very broad terms, are not bound for it.³ It was also held, in 1859, that a railroad tax was comprised in the word "county levy," as used in one of the bonds which the sheriff might give, with the alternative at that time of some other person being appointed collector thereof; and

¹⁸ Rowlet v. Eubank, 1 Bush, 477.

¹⁹ Terry & Bell v. Hazlewood, *ubi supra*.

¹ Commonwealth v. Tate, 12 Ky. L. R., p. 1 (as to State Treasurer), following Bonta v. Mercer County Court, 7 Bush, 576 (sheriff owes the county revenue not to the County Court, but to the people of the coun-

ty); also Elliott County v. Kitchen, 14 Bush, 289; same doctrine held by S. C. U. S. in U. S. v. Kirkpatrick, 9 Wheaton.

² Commonwealth v. Gabbert, 5 Bush, 488, following Bartlett v. Prather, 2 Bibb, 58.

³ Anderson v. Thompson, 10 Bush, 182.

though he gave an additional bond, under an order of court, for the collection of the railroad tax, the sureties on the more general bond for "county levy" remained bound.⁴

A sheriff is not responsible on his bond for money which he does not collect by virtue of his office. Hence, if an execution is stayed by the plaintiff, in which case the sheriff's power would cease, his bondsmen are not responsible for money which the defendant may pay to him thereafter. But the language of the return, which shows a levy, and a stay by plaintiff's orders immediately thereafter, will be rather construed to mean a mere postponement of the sale, and parol evidence is admissible to show such to have been the fact; as the sheriff's return is not conclusive in his own favor, even in an action other than for a false return.⁵ A constable, however, is liable *on his bond* for simple collections, without any process, but only for amounts within the jurisdiction of the inferior courts whose process he serves.⁶

It was laid down as the rule in a suit on a constable's bond, and would apply as well to the bond of a sheriff re-elected to office, that a new bond secures only process put into the officer's hands after he qualifies by giving such bond, not money collected after the execution of the bond upon process put into his hands before it was executed.⁷

In one reported Kentucky case only,⁸ the apportionment of a defalcation, which ran on through two bonded terms, among the sureties in the two bonds, came up for decision. The sheriff had collected the county levy for two years, giving a new bond for the collection of each year as the law provides. At the end of the first year a balance of \$2,407 was found in his hands, which may have been made up, in whole or in part, of uncollected bills. The payments made to county creditors during the next year exceeded this balance greatly. In the absence of proof to the effect that he had made the payments

⁴Taylor v. Nunn, 2 Met. 199, 203, and MS. Op. in Sloan v. Ellis there quoted.

⁵Chamberlin v. Brewer, 3 Bush, 561.

⁶Com'th v. Sommers, 3 Bush, 555.

⁷Boswell v. Sheriff, 8 Bush, 97.

⁸Helm v. The Commonwealth, 79 Ky. 67.

out of the collections of the second year, the rule laid down by Judge Story in *U. S. v. Kirkpatrick* was followed: that is, the first payment was applied to the oldest debt, and thus the burden of the final deficit was thrown wholly on the signers of the second bond.

SEC. 159. OTHER BONDS AND COVENANTS. By an act of 1812, re-enacted in the Revisions, "all unsealed writings stand on the same footing with sealed writings," but the consideration of all writings may be impeached or denied.¹ Every written contract being thus a "deed," the strict common law rules which had governed sealed instruments naturally fell into disuse: such as the old rule against filling blanks in a bond under parol authority.² A seal or scroll is not attached to the bonds having the force of a judgment, or otherwise taken in the course of judicial proceedings, or to bonds for the faithful conduct of fiduciaries and officers, any more than to contracts between man and man. Ordinary mercantile contracts are made every day, and the signature of the principal is appended by clerks or business managers who hold no written authority; in other words, contracts having the force of a "deed" are made by attorneys not appointed by "deed," and acting under an implied authority only; the commonest case is that of partners, who are agents for each other, in putting the firm name to their commercial paper and other obligations.³ But, notwithstanding the act of 1812, which seemed to destroy the distinction between sealed and unsealed obligations, it has been held that by affixing a seal, or even a scroll (or *scrawl*), to his firm signature a partner exceeds his powers, and the writing will no longer bind his companions.⁴

¹ Rev. Stat., and Gen. Stat., Ch. 22, Secs. 2 and 8; M. and B., I, 343; 4 Litt. Laws of Ky. 384.

² See *supra*, Sec. 154, n. 23.

³ *Southard v. Steele*, 8 Mon. 485 (1826), the authority of one partner to bind the other by an unsealed submission to arbitrators is recognized; *Montgomery v. Boone*, 2 B. M. 244, a case of a promissory note sued on as a specialty.

⁴ *McCart v. Lewis*, 2 B. M. 267;

Trimble v. Coons, 2 A. K. Mar. 375; *Doniphan v. Gill*, 1 B. M. 199, and recognized in the cases given in note 3; *Cummins v. Cassily*, 5 B. M. 74, where all the cases are reviewed. An instrument which would have been binding on the partners without the seal was avoided by its presence. In *Lewis v. McCart* it was said, that though implied authority was not sufficient, express authority by parol or recognition might be.

The law imparting the force of a sealed instrument to a writing simply signed has never been extended to a bill of exchange, either as against the acceptor, or the drawer, or indorser,⁵ nor to the indorsement of a negotiable, or the assignment of a non-negotiable note,⁶ nor to mere receipts or acknowledgments, nor to a memorandum in writing which may take a promise out of the Statute of Frauds.

Coming to "bonds," in the narrower sense, those with a condition, we may first mention those securing the faithful performance of duty by employes, such as cashiers of banks. There need not be a formal acceptance of such a bond; if the employe is allowed to act under it, the consideration for the bond arises, and it stands as accepted and is in force.⁷ An arrangement which is brought home to the bondsmen (for instance, by the by-laws of a banking company for whose cashier they become bound), that they are not to be released from continuing liability by new and additional bonds, is not against the policy of the law, and will be enforced.⁸

Where a written contract, which in law is a bond, attempts to secure the payment of damages by *liquidating* them, the tendency in Kentucky is to treat such liquidation as a mere penalty, to be enforced no further than damage has been sustained; and such damage must be proximate, and not merely the loss of an opportunity to make profits. A lot was sold on credit for a distillery; the vendor agreed to do some filling and other work upon the lot within a stated time, and to pay as "liquidated damages" \$20 for the delay of each day thereafter, to be *deducted* from the purchase money. Though the uncertainty of the loss of profits in the business of distilling seemed to call for a liquidation of damages, the court treated them as a mere penalty to cover either actual outlays only by the obligees, or the cost of finishing the work undertaken by the seller, and rejected the distinction between "deducting"

⁵ Assumpsit was the remedy before the Code. *Anderson v. Anderson*, 4 Dana, 858; *Breckinridge v. Shrieve*, *Ibid.* 875; *Tribble v. Oldham*, 5 J. J. Mar. 187. But a warranty inserted in the receipt is a sealed contract.

⁶ See *infra*, Sec. 168.

⁷ *Graves v. Lebanon Nat. Bank*, 10 Bush, 28.

⁸ *Pendleton v. Bank of Kentucky*, 1 Mon. 178, 177.

the damages from the purchase money and setting them off *ad infinitum*: thus giving to the liquidation an unreasonable meaning, with a view of turning it into a mere penalty.⁹

That in some cases "liquidated damages" will be allowed to stand was admitted, but when such cases would arise was not clearly indicated.

We have spoken of title bonds as creating an equity in land; we have shown what title and what deed the obligee may demand, and that the obligor can hardly be put permanently into default, except by judgment for damages against him.¹⁰ But where a man binds himself to convey land which he knows that he does not own, or where, after his bond for a conveyance, he sells the land to another, he is at once in default and deemed guilty of fraud.¹¹ In such cases he must pay by way of damages the value of the land at the time when the deed or delivery of the land may be demanded;¹² while, in the absence of fraud, the executory phase of the bond will be construed like the warranty, which is expected to take its place in the deed of conveyance: the obligor will be liable only for the value at the time of the bond, to be gathered from that document; that is, for the purchase price therein expressed, and if nothing has been paid, he will be liable for nominal damages only. Unless the vendor willfully disposes of the land it is not necessary for the vendee's protection to give him damages for the loss of a good bargain, as in the case of a contract for grain or provisions; for he can enforce the bargain specifically as long as the vendor holds the land, while he can not thus enforce a contract for the purchase of goods.

Bonds of counties, towns, railroad companies, etc., issued for the purpose of raising money, and made payable to order or bearer, may be classed along with negotiable notes.

⁹ Hahn v. Horstman, 12 Bush, 249.

¹⁰ See *supra*, Sec. 80, nn. 2, 3, 6, also for adjustment of accounts upon a rescission.

¹¹ McConnell's heirs v. Dunlap's dev's, Hardin, 41; value in such case to be estimated by jury as of time of inquiry; approved in three cases in 2

Bibb, pp. 47, 440, and 548.

¹² Stephenson v. Harrison, 3 Litt. 170, 174. And if in such case there is a partial default, the obligor can not clear himself by praying a *pro rata*, as he might do in a case of good faith, but must pay the value of the part which he can not convey.

CHAPTER XXVI.

PROMISSORY NOTES.

SEC. 160. Notes Negotiable and Discounted in Bank.

SEC. 161. Notes Negotiable under Foreign Law.

SEC. 162. Maker and Holder.

SEC. 163. The Assignor's Liability.

SEC. 164. Implied Warranty of Validity and Title.

SEC. 165. Due Diligence in Prosecuting to Insolvency.

SEC. 166. Measure of Recovery against Assignor.

NOTE.—Bills of Exchange are governed by the "Law Merchant," the slight modifications of which by Kentucky statute are stated in Section 160. The law between assignor and assignee, as given in this chapter, applies not only to notes, but also to bonds, including bonds for the conveyance of land.

SECTION 160. NOTES NEGOTIABLE AND DISCOUNTED IN BANK. Not only every promissory note, as we have seen *supra*, in Section 113, but "all bonds, bills, or notes for money or property" are assignable, so as to vest the right of action in the assignee.¹ But even promissory notes are not negotiable. The innocent holder for value does not hold the note "free of equities," nor is the indorser liable for its payment upon notice of dishonor.² But by Section 21 of the same chapter, formerly only by special provisions in the charter of each bank, promissory notes "payable and negotiable at any bank incorporated under the law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which shall be indorsed to and and discounted by the bank at which the same is payable, or by any other of the banks in this Commonwealth as above specified," are "placed on the same footing as foreign bills of exchange." The word

¹ Gen. Stat., Ch. 22, Sec. 6.

² It is pointed out in *Smallwood v. Woods*, 1 Bibb, 544, that the words

"in the same manner as bills of exchange," which are found in the Statute of Anne, are here omitted.

negotiable is not essential, but the words "to order," which imply negotiable paper, are held equivalent to it.³ As was held in an early case,⁴ an averment that such a note has been indorsed to, and is now held by the bank, implies an allegation that it was discounted by it; but the common practice in pleading is to allege the discount in so many words. The meaning of the term is this: that the bank gave for the note a sum equal to its face, less unaccrued interest. The defendant may show that there was no discount, but that the note was taken as a collateral security only.

Neither is the present statute, nor were the clauses of the old bank charters which placed notes "negotiable and payable at some other bank" on the footing of bills of exchange, satisfied by naming a private bank as place of payment.⁵

When by discount at bank the note has been turned into a bill of exchange, it retains such character though it be afterward indorsed by the bank to some one else, or taken up by the indorser, himself an indorsee and innocent holder;⁶ and he can enforce the note, like the bank, regardless of the maker's equities. Not so when the original payee, or a holder who took the note with notice of the equities, takes it up from the bank.⁷

The question how a party who takes such a note in good faith, but having learned of a defense to it, has it discounted purposely to defeat those equities, would stand toward the maker after taking it up in bank, has been raised at the bar, but never decided by the Court of Appeals.

The Law Merchant of England and America applies in Kentucky as elsewhere to corporate and municipal bonds.⁸

"Grace" is allowed in Kentucky on negotiable bills and notes, including sight drafts.⁹ The bank holidays are: The

³ McCormick v. Clarkson, 7 Bush, 519 (187-).

⁴ Grey & Powers v. Bank of Ky., 2 Litt. 378 (182-).

⁵ Campbell v. Farmers Bank of Kentucky, 10 Bush, 153 (187-).

⁶ Spencer v. Biggs, 2 Metc, 123, 126 (1859).

⁷ Tuggle v. Adams, 3 Mar. 430.

⁸ Bainbridge v. City of Louisville, 83 Ky. 281 (so treated as matter of course).

⁹ It was said in Goddin v. Shipley, 7 B. M. 575, that the allowance of grace in another State is not a matter of general mercantile law of which the courts can take notice, but must be proved.

22d of February, 4th of July, the 25th of December, and "all days appointed by the President or Governor as days of fasting and thanksgiving." When a holiday falls on a Sunday it is kept on the next day, and bills or other papers then maturing must be paid on the preceding Saturday.¹⁰

By statute the notary protesting a bill or note sends out the notices of dishonor, and his recital in the protest is proof of the time and manner of sending; and where a notary in a sister State does so under its laws, his certificate to that effect is made proof of the fact here.¹¹

SEC. 161. NOTES NEGOTIABLE UNDER FOREIGN LAW. If a note is made payable at some place in a State whose laws put all promissory notes drawn in that form on the footing of inland bills, or is dated in such a State, and, bearing no place of payment, is presumably payable therein, the courts of Kentucky will, as against the maker, treat it as commercial paper; but the foreign law must be fully and distinctly set forth.¹ In an early case, where the form of the remedy dispensed with a formal pleading of the foreign law, it was held that the innocent holder for value of a note, payable at the United States Bank of Pennsylvania, could recover on it, though the contents had before the indorsement been fully paid to the payee, upon proof that such a note by the law of Pennsylvania falls under the law merchant.² The report does not set forth where the note was dated, nor where it was transferred; but the place of transfer would be immaterial as against the maker.

In a case no longer binding, where a note had been made at Memphis in Tennessee, dated and payable there, and was indorsed in Tennessee to a purchaser in good faith for value, and by him to plaintiff, who brought suit on it in Kentucky, a set-off between the maker and payee was allowed by the Court of Appeals, on the ground that the allowance of set-offs relates to the remedy, and must be governed by the *lex fori*.³

The court would not see that the indorsement in Tennessee

¹⁰ Gen. Stat., Ch. 51.

² Tyler v. Trabue, 8 B. M. 306.

¹¹ *Ibid.*, Ch. 79, Secs. 5 and 6.

³ Davis v. Morton, Galt & Co., 5

¹ Roots v. Merriwether, 8 Bush, 401. Bush, 160.

under its law raised a privity of contract between the maker and indorsee, leaving no room for a set-off against the payee, who to this new contract was but a stranger. The decision was not well received, and has very lately been expressly overruled,⁴ and set-offs are now ruled out in like manner as other "equities."

But the rights of the holder against the indorser do not depend on the place where the note is payable, but on the place at which it is assigned; and that place is not determined by the act of writing the indorsement, but by that of delivering the note.⁵ So, where a note negotiable by the law of Ohio, held by a resident of Kentucky, is sold and assigned by him in Kentucky, he does not become bound as indorser under the law merchant governing such notes in Ohio, but as an "assignor" under the peculiar law of Kentucky, to be discussed hereafter.⁶ The indorser even of a bill of exchange does not undertake to pay at the place where it is payable, but "to pay generally;" hence his contract is governed by the *lex loci*, which is the law of the place of delivery; on that ground it was held that he who in Kentucky assigns a *note* not negotiable in Kentucky is a mere assignor, notwithstanding the law of the State where the note is payable, by which law he is held upon mere notice of dishonor.⁷

⁴ *Stevens v. Gregg*, 10 Ky. L. R. 268; marked for publication, but not in 87 Ky. where it ought to be.

⁵ *Young v. Harris*, 14 B. M. 556. Note payable in Ohio, indorser's name written in Kentucky, but for delivery in Ohio; indorser discharged because instead of demand and notice of dishonor under the Ohio law, the holder proceeded by suit against the maker according to the law of Kentucky. The decision is rested on the place of transfer. But where a note, payable in another State which by its laws turns it into an inland bill, is payable to a resident of Kentucky, who, having never left the State, must have written his name on the back of

the note within it: this does not prove a Kentucky contract of assignment, the note having been sent to the other State and being held there. (*Goddin v. Shipley*, 7 B. M. 575.)

⁶ *Carlisle v. Chambers*, 4 Bush, 268. The case is plainly right on this point; but the main question in the case, whether a mortgage by the indorser's wife secured his liability only, and not the note itself, was hardly touched upon; see on this point *Wheeler v. Glenn*, Superior Court, 6 Ky. Law Rep., p. 289.

⁷ *Short v. Trabue*, 4 Met. 299, disregarding the great English case, *Rothschild v. Currie*, on the weight of American authority.

SEC. 162. MAKER AND HOLDER. While the law of Kentucky does not, like the law merchant, raise a privity between the maker and a remote holder from the words "order" or "bearer," it does raise it from the clear intent of the parties, where a note is made for the purpose of obtaining a loan, and is not expected to have any binding force till some third person advances value upon it. Such a note, when signed by the maker for the accommodation of the payee, will be held good in the hands of one who is in form an assignee, though his assignor could not have maintained a suit on it himself, and this though the latter may have failed in promises of indemnity to the maker,¹ and probably though he have made misrepresentations to him. This result is not made to depend upon the words "or order," or any other formal parts of the note, but rather upon the proved intent of the parties. But having once been used for the payee's accommodation, and been taken up by him, the note can not be used a second time without fraud, and can not be recovered on by a second purchaser.²

Where a man, wishing to borrow money, executed with his sureties a note payable to the order of a named bank, but not obtaining a discount at the bank, delivered the note to a stranger, who advanced money thereon, it was held by the Court of Appeals in 1831 that no action could be maintained on the note, either in the name of the bank or of the real holder.³ But notwithstanding the strong and, it appears to us, unanswerable opinion in which Chief Justice Robertson sustains this view,⁴ it has since been overruled in two cases;⁵ in

¹ Gano v. Finnell, 13 B. M. 890.

² Frazer v. Edwards, 5 Dana, 538.

³ Bank of U. S. v. Conway, 6 J. J. Mar. 126.

⁴ *Quære*: Is his position in Gore v. Ross, 2 B. M. 299, also overruled, where he says: "If, as testified on trial, Ross signed the blank note for the single purpose of enabling his principal to borrow money from Suduth, and make the note payable to him and no other person, and the obligee, Pettit, to whom it was afterward

made payable, without R.'s knowledge or consent, and his assignee, Gore, had notice of that purpose, there can be no doubt that the plea of *non est factum* was sustained, for he might have been willing to be surety to one creditor when he would not be so bound to another, in whose forbearance he had not as much confidence."

⁵ Smith v. Moberley, 10 B. M. 266 (1850); Ward v. Northern Bank Kentucky, 14 B. M. 851 (1853). See *contra* Rogge v. Cassidy, 12 Ky. L. R. 54.

one of them New York decisions are relied on for the new rule. In both of these cases the payee named in the note lent his (or its) name to the actual holder.

But where a note, intended by the surety to enable the maker to raise money, was used by him in the discharge of an antecedent debt, the surety was held not bound;⁶ and while recognizing this as a proper exception, the new rule has been lately reaffirmed,⁷ and seems now unassailable.

In the last case it seems that the party advancing the money brought the suit in his own name.

Where the obligor of a note "induces the assignee to purchase it, or flatters him with assurances that it would be paid," he is estopped from setting up any equity which he may have against the obligee, and this is said to be too well established to need any quotation of authorities.⁸ The word equity must be here understood in the sense of the law merchant; that is, any defense against a genuine note or bill not appearing on its face; and the principle here declared is a slight substitute for the negotiability of promissory notes. It would, however, apply to all contracts that are assignable in any way, whether by statute or by the rules of equity. In a subsequent case the principle was applied to a note given for a gaming consideration, and that a new note having been executed by the maker direct to the assignee, to take up the old one, was considered as presenting an even stronger case, though the assignee who had given value for the old note knew its unlawful consideration at the time of taking the new note in place of it.⁹ In a much later case, where the payee of a note offered it in payment of goods, and the maker on inquiry answered "that the note was all right and would be paid at maturity," and thereupon the sale was made and the note accepted in payment, the maker was held estopped, nor was he allowed to show that he made the statement, not knowing the circum-

⁶ Russell v. Ballard, 16 B. M. 205 (1855).

⁷ Browning v. Fountain, 1 Duv. 13 (1868).

⁸ Morrison, adm'r v. Beckwith, 4 Mon. 73 (1827).

⁹ Wooldridge v. Cates, J. J. Mar. 223 (1829). *Quære*: Whether, under the present more stringent statutes against gaming, such a decision could be rendered?

stances on which the validity of the note depended. He should have expressed his doubt if he wished to avoid liability.¹⁰ In a subsequent case this liability of the maker to an assignee who has bought the note on his assurance is made the reason for according to him the same rights against third parties as if he had paid the note.¹¹ But the effect of an estoppel can not be given to a promise made by the maker to the assignee after the assignment is completed; such a promise could have no other effect than that of the mere admission of the justice of the note, to be explained or met by other proof.¹²

But in the absence of the privity arising from intent, or of estoppel, the maker of non-negotiable paper can, by the very words of the statute, set up against the holder, however innocent, not only any defense or discount, but any *off-set* that he "has and might have used against the original obligee, or any intermediate assignor, before notice of the assignment."¹³ Where the maker is a surety for the payee upon another and independent demand, which does not become due before he is notified of the transfer to a third party of the note or bond made by him, he can not "have an off-set" in time to use it against the assignee.¹⁴

It has been held that a debtor can have a note on his creditor assigned to himself as trustee for the assignor, and to "set it off," thus saving the amount for the payee, where his creditor, the maker, is insolvent. It was here set off against an account.¹⁵ There is no reason why the same course should not be successfully pursued so as to set off the note thus acquired *pro forma*, against a note on the party acquiring it, if it be transferred to him before he is notified that the note on him has been assigned.

The difficulty formerly felt in pleading upon a note payable to the maker's own order has been remedied by statute,

¹⁰ Smith v. Stone, 17 B. M. 171.

¹¹ McBrayer v. Collins, 18 B. M. 888, 889.

¹² McClanahan v. Clay, 5 B. M. 241.

¹³ Gen. Stat., Ch. 22, Sec. 6.

¹⁴ Walker v. McKay, 2 Metc. 294, approved in Henderson Nat. Bank v. Lagow, 3 Ky. Law Rep. 178.

¹⁵ Graham v. Tilford, 1 Metc. 114.

which raises a contract between the maker, if the note be indorsed by him, and persons to whom he delivered it, and renders the note assignable by the latter.¹⁶ The holder of such a note may sue upon it without following up the first indorsement, but only by filling it up does he obtain a written assignable obligation.¹⁷

SEC. 163. THE ASSIGNOR'S LIABILITY—GROUNDS FOR IT. Where a promissory note, or indeed any contract assignable under the act of 1798 or its re-enactment in the General Statutes, is assigned for value, and the assignor puts his signature in blank or an indorsement or assignment in the ordinary words on the back of the instrument, he makes himself liable to his immediate assignee for the consideration received upon the transfer, with interest, if such assignee should fail, after use of due diligence, to collect the debt; and he must also make good to him the costs of the suits, the institution of which goes to make up such due diligence. The doctrine is derived from Virginia, and was well explained by the Supreme Court of the United States in 1803, in a case coming up from the Virginia side of the District of Columbia, the suit being brought against a remote assignor:

“The act of the Virginia Assembly, which makes notes assignable, gives the assignee an action of debt in his own name against the maker of the note, but is silent with respect to the claim of the assignee against the assignor. It was, therefore, long a matter of doubt whether the assignor became liable on his mere assignment, without any special agreement, for the contents of the note in the event of the insolvency of the maker. The doubt has at length been settled in Virginia so far as to declare the liability of the assignor, but not the amount for which he is liable. It seems to be yet a question whether he is answerable for the sum mentioned in the note, or for only so much as he received for it, provided he shall be able to prove the sum actually received. It is also a question whether the assignee can have recourse to any other than his immediate assignor. As the act of Assembly gives no

¹⁶ Gen. Stat., Ch. 22, Sec. 18.

¹⁷ Pace v. Welmending, 12 Bush, 141.

right to sue the assignor, such an action can only be maintained on the promise which the law implies from the assignment, and consequently can only be sustained by and against the persons to and from whom the law implies such a promise to have been made.”¹

With this view of the assignor's liability, it was held at an early day in Kentucky that there is in the indorsement in the usual form “nothing which engages,” *totidem verbis*, to pay any thing if the maker fails ; that it is not a written contract and may therefore be explained by parol, and if it appeared that the assignor, when he put his name on the back of the note, stated that he did so without recourse, or such seemed to be the intent of the parties, he would not be held responsible.²

On the other hand, where the judgment of a court allowed the holder of a certain note to pay a debt with it by “assigning” the note, the assignment made in pursuance of the decree must be understood to carry the usual responsibility.³

But when the assignment is made by delivery only, as of an instrument already assigned in blank,⁴ or when otherwise only an equitable title to the note or bond is conferred, such an act “affords a strong presumption” that the assignor is not to be liable.⁵ This, however, may not be conclusive—just as little as the written indorsement is conclusive the other way.

Where a stranger puts his name on the back of a promissory note with the obvious intent of making himself liable for it in some way to the payee, the power to fill up a guarantee was formerly presumed ; but the General Statutes direct that the liability of such stranger shall be the same as if he was the assignor of the note.⁶ And where an assignor adds to his indorsement the words, “If the maker is not good, I stand

¹ *Mandeville v. Riddle*, 1 Cranch, 290, 298.

² *Butler v. Sudduth*, 6. Mon. 540. The assignors of a forged bond were released on the evidence in *Coffman v. Allin*, 1 Bibb, 469 ; second case between same parties, with same result, Litt. Sel. C. 200.

³ *Cross v. Petree*, 10 B. M. 413.

⁴ *Markley v. Withers*, 4 Mon. 15.

⁵ *Porter v. Breckinridge*, Hardin, 21, 27 (case of a title bond).

⁶ Gen. Stat., Ch. 22, Sec. 14. The consideration paid to the maker is also paid to such indorser, and need not be alleged otherwise in pleading. (*Kracht's administrator v. Obst*, 14 Bush, 84.)

good for him and am responsible," his liability is not thereby enlarged from that implied by law.⁷

The holder has at law no claim against a remote assignor;⁸ that is, against one to whom he has not paid the purchase price of the note, or who has not, for the accommodation of preceding parties, put himself in the position of last assignor. But equity works out a *subrogation* against a remote assignor when the immediate assignor has departed from the State, and probably, also, when he is insolvent; the holder having taken all proper steps against the maker.⁹

An assignor who has, *being bound to do so*, paid the last assignee, thereby steps into his shoes, and can then sue his own assignor; but not, if, for want of proper steps by the last holder against the maker, he was not bound to pay.¹⁰

A promise made or *note* given by the assignor to the assignee, when the latter has already by laches lost his recourse, is not supported by even moral responsibility, and can not be enforced.¹¹ And thus, where the holder of two notes secured by lien or mortgage assigns one for value, and is discharged from his responsibility by the laches of the assignee, the latter will not be preferred out of the proceeds of the lien or mortgage, but assignor and assignee will share on an equal footing.¹²

But where the sale of a note or bond is brought about by fraud or misrepresentation, the buyer may at once, upon the ground of *rescission*, recover back the consideration with interest, without an attempt to coerce payment from the maker; and this, whether the note or bond is worthless by reason of its invalidity or through the insolvency of the maker.¹³ The suit sounds in tort rather than in contract, and the written and in-

⁷ Cravens v. Hopson, 4 Bibb, 287.

⁸ Not even where the assignment is to B. and C., and B. and C. assign to B. alone. Morris v. Tyler, 10 B. M. 376, following Drake v. Johnson, Hardin, 218, and other cases. The liability of the assignor does not pass at law by the assignment of the note.

⁹ McFadden v. Finnell, 8 B. M. 121, recognized already in Fitzgerald v. Peck, 4 Litt. 125.

¹⁰ Berthoud v. Wood, 4 J. J. Mar. 303; Latham v. Western, 8 B. M. 297.

¹¹ Mardis v. Tyler, *ubi supra*; Clay v. Johnson, 6 Mon. 644 (new note by assignors, treated on the merits of their former liability and sustained).

¹² Green v. Cummins, 14 Bush, 114.

¹³ Cope v. Arberry, 2 J. J. Mar. 296.

dorsed instrument is not the basis of the action.¹⁴ For knowingly selling a forged bond, or a note already collected by himself, the seller would be bound to return the price received with interest, though the assignment should not be made in writing, or though even it were expressly made "without recourse."¹⁵ To sell a note already collected is a fraud, and for such a fraud "the cause of action accrues instantly upon the assignment being made."

Where the form of assigning a note is pursued in order to strengthen its credit with the assignee, the remedy against those assigning it in form is the same as if the assignment was real, and as if the consideration passing to the maker went to them.¹⁶

The assignment of a judgment which is equitable only, and not authorized by statute, raises no implied liability for the price paid.¹⁷

SEC. 164. IMPLIED WARRANTY OF VALIDITY AND TITLE. Before the obligor's solvency can be tested on execution, it must first appear that the assigned note or bond is genuine and valid, and that the assignor was at the time of the assignment its lawful owner. These matters he guarantees by assigning the note for value to the extent of the value received.

It was said by the Court of Appeals in 1853: "We understand the doctrine to be, that the assignor of a bond, either for money or land, undertakes by implication that he has the right to pass to the assignee what his assignment purports to pass."¹

The same rule applies to a note as to a bond. But in a suit against the assignor of a note the same court said in 1867: "The sale of the note implied a guarantee of its genuineness as to all apparent parties to it, but the owner was under an implied obligation to try by due diligence the liability as well as the solvency of the ostensible obligors."²

In other words, in the absence of fraud, the assignor is not liable on account of the invalidity of the note, unless it has

¹⁴ Hurst v. Chambers, 12 Bush, 155, *arguendo*.

¹⁵ Coffman v. Allin, Litt. Sel. C., 200 (case went off because fraud was not charged in the bill).

¹⁶ Clay v. Johnson, 6 Mon. 644, 663.

¹⁷ Robinson's adm'x v. White, 4 Litt. 237.

¹ Emerson v. Claywell, 14 B. M. 18, 19.

² Wynn v. Poynter, 3 Bush, 54.

been established by the judgment of a court. The assignee can not forestall that judgment by suffering a non-suit in his action against the maker.

It was said in a much older case, in which the assignors sought to be discharged because the note was tainted with usury :

“It is, in truth, a part of the legal obligation of the assignor of a note or bond that he will be responsible for the validity of the note or bond.”³

It has been held that when the assignor becomes liable by reason of the invalidity of the note, the assignee must plead the grounds on which it turned out to be invalid, unless indeed the assignor was a party to the suit, in which case the statement that the note was adjudged invalid in a suit to which the assignor was a party would be sufficient against him.⁴

But if the assignor had no notice of the pendency of the suit,⁵ or if he should offer to manage it at his own expense, and be forbidden by the assignee to do so,⁶ the judgment for defendant would not be evidence against him.

SEC. 165. DUE DILIGENCE IN PROSECUTING TO INSOLVENCY. C. J. Bibb, in 1809, put the necessity of prosecuting the obligor without delay on the ground that the assignor guarantees the note as being good for its contents only at the time of transfer, but does not guarantee that it will remain good indefinitely ; that the question, what is due diligence and what fatal delay, is a question of law, and that the assignee must use every “process of the law against the debtor, until his insolvency is established, or the suit and its incidental remedies prove insufficient to coerce payment.”¹ Imprisonment

³ Owings v. Grimes, 5 Litt. 331.

⁴ Elliott v. Threlkeld, 16 B. M. 341.

⁵ Morgan v. Simmons, 3 J. J. Mar. 611; Maupin v. Compton, 3 Bibb, 214: *contra*, Scott v. Cleveland, 3 Mon. 62, (holding the assignor to the judgment of a foreign justice's court in favor of the maker, he not being a party to the suit) seems to be overruled.

⁶ Samuel v. Hall, 9 B. M. 374.

There may be laches in a suit resulting in judgment exonerating the maker. Searcy v. Gardner (Superior Court), 9 Ky. Law Rep. 889.

¹ Smallwood v. Woods, 1 Bibb, 542, following McKee's ex'r v. Davis, 2 Wash, 219. A petition alleging that suit was brought “in due time,” without saying when, is bad even on error. (Puthoff v. Howe, 8 Ky. L. R., 758.)

for debt being then in vogue, the obligor had given special bail, but after a return of *nulla bona* on a *feri facias*, the assignee had not taken out his *ca. sa.*, and had therefore not "fixed the bail." The record of the suit was therefore "no evidence of the insolvency" of the obligor. In another early case in which a *ca. sa.* was issued against the obligor's body, his insolvency was said not to be made out, because the result of that step was not shown.² The notorious insolvency of the maker does not dispense with the necessity of speedy action against him.³

I. *When to Bring Suit.* The doctrine is now fully established that a suit for a personal judgment against the maker must be brought in time for the first term, after the maturity of the paper,⁴ or after the assignment of overdue paper,⁵ to which process can be made returnable. Where the holder of the note learns that the maker is about to leave the State, it may be laches in him not to sue at once, so as to save the next term.⁶ But where no such ground for haste appeared, it was not deemed laches to wait a few weeks after maturity, where eight clear days were left in which to sue a man living six miles from the court-house, and always at or near his home, though the sheriff in the press of business failed to serve him and a term was lost, the court being unwilling to establish the "convenient test" of the assignee suing on the next day after the maturity or assignment, or taking the risk of losing the term.⁷ To waste two months, however, and then to have only two days for serving the writ, which was not served in time, was deemed fatal; the assignee should guard against casualties.⁸ Where the last day for service came three days after the maturity of a note, suit for the term was excused as imposing unusual haste.⁹

² Owings v. Grimes, 4 Litt. 381.

³ Francis v. Gant, 80 Ky. 190.

⁴ Markley v. Withers, 4 Mon. 15; Thomas v. Taylor, 2 J. J. Mar. 219; Hume v. Brown, 8 Dana, 450.

⁵ Beard v. McElroy's adm'r, 6 B. M. 416.

⁶ Latham v. Western, 8 B. M. 297. He was, however, excused, as he had

sold the note to a third party, whom he could not notify in time.

⁷ McMurray v. Wood, 7 Dana, 45.

⁸ Perrin v. Broadwell, 8 Dana, 596.

⁹ Green v. Page, 80 Ky. 368. And where a married woman joins in a note no attempt need be made to get a judgment against her.

The convenience of obtaining judgment *in personam* and for the sale of mortgaged land at the same time does not excuse the holder from suing first in a Quarterly Court having power to give the former, but not the latter, where two of its terms come in earlier than that of the Circuit Court at which judgment is obtained.¹⁰ The judgment *in personam* can not be delayed for the sake of convenience.

Where a mortgage or reservation of lien gives to the holder of several notes an option to treat them as all due on default in one, or to treat the principal sum as due on a default in interest, he must avail himself of that right;¹¹ while, if different notes fall due at different times, each must be sued on in time for the first term, without waiting for the next note.¹²

If the maker removes to another county within the State, he should be sued in that, not in the county of his former residence.¹³ If he leaves the State for a temporary purpose he is in the mean time deemed a resident of the county in which he lived before his departure, and a suit in that county is well brought.¹⁴ He must be sued without delay upon his return.¹⁵

The courts in Jefferson County being open for business all the year, with weekly rule days, on which all cases can be "set" on which process has been served for more than twenty days, a delay of nine days after maturity of the note, whereby one or two of these rule days are missed, is as bad as missing a term elsewhere.¹⁶

II. *Prosecuting the Suit.* Where the holder in the suit against the maker consents to a continuance, and thus loses a

¹⁰ *Rives v. Brown*, 81 Ky. 636, necessitating two suits. And see further as to the insufficiency of the execution from the Quarterly Court.

¹¹ *Parks v. Cook*, 8 Bush, 168. The notes were secured by liens in a deed which the maker of the notes had not signed. Still that deed was held to hasten his liability by the clause stated.

¹² *Coleman's adm'r v. Tully's ex'r*, 7 Bush, 72; and the proceeds of land

sold under lien was *not* applied to the first note, on which recourse had been lost by laches.

¹³ *Burk v. Morrison*, 8 B. M. 131.

¹⁴ *Beard v. McElroy's adm'r*, 6 B. M. 416.

¹⁵ *Brinker v. Perry*, 5 Litt. 194.

¹⁶ *Stafford v. Bruce* (Sup. Ct.), 10 Ky. L. R. 187, affirmed in Court of Appeals, Oct. 30, 1889, but held up on petition for rehearing.

term, he also loses his recourse.¹⁷ It was held, at a time when depositions could be only taken upon an order of court, that the assignee should have sued for a term at which he could not take judgment, that he might at that term have the proper orders made for taking depositions, and that his taking a continuance at a later term, in order to obtain a deposition from another State, broke his line of due diligence.¹⁸ But an unexplained order of court, postponing the case for eleven days from the day for which it was docketed, yet within the same term, was not deemed laches.¹⁹

III. *Taking out Execution.* An execution directed to the sheriff of the county in which the maker resides is the first and indispensable proof of his insolvency, for the return of an execution directed into another county proves nothing.²⁰ A delay in having execution issued after it is due is viewed more strictly than a delay in bringing the suit or obtaining judgment.²¹ In one case as short a delay as seven days in the issuing of the execution after it was due of right, being wholly unexplained, was deemed negligence; but upon a return of the case it was deemed sufficiently excused, and judgment was rendered for the assignee, which the Court of Appeals affirmed.²² Thus, where the plaintiff's attorney had given standing orders to the clerk to issue all his executions when due, but the clerk was suddenly called away, and his deputy would not act without orders, a delay of ten days occurred, which, under the circumstances, was excused. Proof of the maker's insolvency was here admitted, to show that greater speed would have been of no avail.²³

¹⁷ Marrs v. Smith, 7 B. M. 192.

¹⁸ Sayre v. Bayless, 1 B. M. 304. Where a continuance was improperly granted by the court on account of a trifling amendment in the petition, the assignee was not made to suffer for the error. (Clark v. Prentice, 3 B. M. 584.)

¹⁹ Whaley v. Vanhook, 4 B. M. 271.

²⁰ Hogan v. Vance, 2 Bibb, 34.

²¹ McMurray v. Wood, 9 Dana, 45, *arguendo*; Prather v. Passmore, *Ibid*.

²² Later cases proceed on shorter delays than that which was there held fatal.

²³ Beard v. McElroy's adm'r, *ubi supra*. See next case for account of second trial and appeal.

²⁴ Taylor v. Daniel, 9 B. M. 53. "But if the most active steps would be alike unavailing with the most dilatory, the pursuit of the usual steps in the usual time and manner" is enough. A much longer delay, in-

Where the assignee had recovered a judgment, both *in personam* and for the sale of the land, he was not justified in waiting two months for his execution, while the proceedings for a sale were going on.²⁴

IV. *The Return on the Execution.* As an execution from a quarterly or justice's court can not be levied on land, a return of "*nulla bona*" upon it does not prove insolvency, and must be followed up by a transcript, new execution thereon from the clerk's office of the Circuit Court, and return thereon under Section 723 of the Code.²⁵

A return made before the return day, not hastened by the plaintiff's request, seems to be good as proof of insolvency.²⁶

The sheriff's return on an execution *de bonis testatoris*, that there were no assets, was deemed sufficient; proof of an estate being left by the decedent should come from the other side.²⁷

Where the execution against the maker is stayed by replevy bond, he is shown thereby to be solvent; if the execution on the bond turns out fruitless, the sheriff must have failed in his duty, and the assignee ought to sue him first, before having recourse an the assignor.²⁸

V. *Pursuit of Other Remedies.* Where the note appears on its face, or otherwise, to be secured by mortgage, vendor's lien, or like security, the security must be pursued and exhausted before recourse on the assignor.²⁹ This rule should apply as much to subsequent securities as to those existing before the transfer of the note; and it seems that where the obligor makes a deed of trust for the benefit of his creditors, the assignee must seek his dividend thereunder before taking recourse against the assignor.

cluding a Christmas vacation, was, in the case of a notoriously insolvent maker, excused upon similar grounds, in *Clark v. Prentice*, 3 B. M. 584. (Coleman's ex'r v. Tully's ad'r, 7 Bush.)

²⁴ *Chambers v. Keene*, 1 Met. 289. "Where the note was secured by mortgage or lien, the assignee was bound to pursue his legal remedy in all respects as if no such security existed" (p. 298).

²⁵ *Barker v. Curd*, 1 Met. 641.

²⁶ *Clark v. Prentice*, *supra*, see p. 585.

²⁷ *Taylor v. Daniel*, *ubi supra*.

²⁸ *Wright v. Strange*, 5 B. M. 150, modifying *McGinnis v. Burton*, 3 Bibb, 6, where replevy bond was held conclusive of the maker's solvency. It is said here not to conclude that fact.

²⁹ *Morrison v. Glass*, 5 B. M. 240; *Miles v. Gray*, 4 B. M. 417.

But that the note states on its face a consideration in land is not proof in itself of an existing lien. In such a case the assignee was allowed to recover after going through the ordinary steps at law.²⁰

Where knowledge is brought home to the assignee that the maker owns effects which might be reached by creditor's bill, it is his duty to try so to reach them ; but it is never his duty to bring a mere " fishing bill " (or bill of discovery), or to seek to set aside fraudulent conveyances.²¹

Where the sheriff makes a levy on the execution against the maker, and the goods are " replevied " or claimed, the assignee must fight it out with the claimant, or show that the goods were not subject to the execution.²²

" Extraordinary " steps, such as " swearing out " an execution before its regular time, are not required of the assignee, though by a race of diligence with other creditors he might have obtained satisfaction.²³ It follows that he need not obtain an attachment against the maker's property, by making oath to the grounds and giving bond against damages, in order to hasten his remedy.

VI. *Excuses for not Taking the Usual Course.* It was said, in the case last quoted, that where the note of a notorious non-resident is assigned, a suit against him at his residence must have been in the contemplation of the parties, and if such non-resident was known to have effects in Kentucky, the remedy in equity by garnishment must have been in their contemplation ; but where, at the time of the assignment, the maker lived and had his property in Kentucky, it was no part of the contract that the assignee should either pursue him into another State or use an extraordinary process in this.²⁴ Where the

²⁰ *Whaley v. Vanhook*, 4 B. M. 271.

²¹ The former position is stated *arguendo*, the latter directly, in *McFadden v. Finnell*, 3 B. M. 121, and in approving the answer to petition for rehearing in *Whaley v. Vanhook*, *supra*.

²² *Levi v. Evans*, 7 B. M. 115. Held in same case, that where the maker owns property encumbered for less

than its value, the assignee must have his executions levied upon it.

²³ *Oldham v. Bengan*, 2 Litt. 132.

²⁴ *Ibid.*, p. 135. At that time choses in action of an absent defendant could be garnisheed without giving bond. In *Brinker v. Perry*, 5 Litt. 194, it was intimated that the maker should be followed to his new residence. Where the maker of the note

maker leaves the State, taking his property with him, or absconds, it is plain that the assignors become liable without any steps (which must be futile) being taken ;³⁶ we may affirm that the departure of the maker after assignment and before maturity would, in itself, be enough to dispense with proceedings against him. If he dies before maturity, and on account of the known insolvency of the estate no administration is taken, and there are no known heirs, the assignor is liable at once ; but, if he died after maturity and after the time for suit to the next term had expired, the assignee can not recover, having lost his remedy before the obligor's death.³⁶

The maker's being declared a bankrupt under a National Bankrupt Law dispenses with all other proceedings.³⁷

That the assignors are indemnified by a mortgage does not excuse the holder from pursuing any part of the regular proceeding.³⁸ But in one case, where the assignor had taken as a security from the maker, besides a lien incident to the note, a mortgage on this and *all* his other property, it was strongly intimated that the assignee was justified in confining himself to his remedy in equity and in not trying to have an execution, which, by the assignor's own act, must turn out fruitless.³⁹

VII. *Indulgence to Maker.* It goes without saying, that any affirmative act by the assignee in giving time to the maker or changing the mode of payment or in releasing a levy already made, without the assignor's consent, exonerates the latter, who stands in the light of a surety for the maker.⁴⁰ And an arrangement made between the assignee and one of two joint assignors will exonerate the other.⁴¹ And where the assignor had given indulgence before the assignment, and thereby caused loss to his assignee, he will be answerable for such loss.⁴²

lived in Mississippi, and should have been sued there, it was held that the proclamation of non-intercourse of August 16, 1861, being the official beginning of the war between the sections, excused the assignee from further steps against the maker, and his claim against the assignor was then fixed. (*Graves v. Tilford*, 2 Duv. 108.)

³⁶ *Clay v. Johnson*, 6 Mon. 644.

³⁶ *Clair v. Barr*, 2 A. K. Mar. 255.

³⁷ *Trimble v. Webb*, 1 Mon. 100.

³⁸ *Roberts v. Atwood*, 8 B. M. 210; *Tucker v. Fogle*, 7 Bush, 294.

³⁹ *Mardis v. Tyler*, 10 B. M. 376.

⁴⁰ *Adams v. Hogden*, 1 Mon. 87.

⁴¹ *Dixon's adm'r v. Campbell*, 3 Dana, 804.

⁴² *Kenningham v. Bedford*, 1 B. Mon. 325.

SEC. 166. MEASURE OF RECOVERY AGAINST ASSIGNORS. The General Statutes, in Chapter 22, Section 7, evidently following the drift of former decisions by the Court of Appeals, provide:

“In an action on an assignment of a writing, it shall be necessary to aver the consideration for the assignment, and only the consideration actually paid by the plaintiff for the note or assignment thereof shall be recoverable by him.”

By those former decisions the assignee recovered the consideration paid, with six per cent interest and the taxable costs expended by him in the attempt to recover the contents of the note from the maker; and, when unsuccessful in recovering judgment against the latter, the costs which he had to pay on the judgment for defendant in the suit against the maker.¹

The statute is not construed as cutting off the assignee's right to interest, or to the costs of the former suit. A case arose, soon after the enactment of the General Statutes, upon the blank indorsement of a stranger to the note, which, under Chapter 22, Section 14, is made to create an “assignor's” liability, and the Court of Appeals held that the plaintiff was entitled to judgment for the amount of the note and interest and cost of the suit against the maker.² As the defendant had indorsed for the maker's accommodation, the same consideration was given for his indorsement as for the note itself, passing from the plaintiff by the same act, and the allowance of interest and of the costs of the former suit must, if they were allowable here, have been awarded against an assignor.

Notes not negotiable are often “assigned” for accommodation only. In every such case the amount received by the

¹ But not the costs of a non-suit suffered (*Buckner v. Curry*, 1 Bibb, 477); nor the costs paid as defendant in a suit against himself by a subsequent assignee. (*Butler v. Sudduth*, 6 Mon. 543.) A petition which does

not set out the consideration of the assignment is bad on demurrer. (*Humphrey v. Hughes' guardian*, 14 Bush, 487.)

² *Kracht's adm'r v. Obst*, 14 Bush, 84, 38 (1878).

maker is the consideration for the assignment.³ Should the assignor, when sued, wish to take advantage of usury in the discount of the note, he need not plead the usury laws, but can simply show how much less than what the plaintiff alleges was advanced on the note.

A remote assignor is liable only for the smallest consideration which passed on the several transfers between himself and the holder; for no more than he has received, and for no more than the holder has paid.⁴

³ *Ibid.*

where relief was given against a mistake of law in paying more.

⁴ *Fitzgerald v. Peck*, 4 Litt. 125,

CHAPTER XXVII.

VARIOUS CONTRACTS.

SEC. 167. The Statute of Frauds—Its Lesser Clauses.

SEC. 168. Sureties and Guarantors.

SEC. 169. Warranties.

SEC. 170. Fire Insurance.

SEC. 171. Life Insurance.

SEC. 172. Common Carriers.

SECTION 167. THE STATUTE OF FRAUDS—ITS LESSER CLAUSES. The fourth section of the English statute for the Prevention of Frauds and Perjuries appears, somewhat enlarged, as the first section of the chapter on Contracts (22) in the General Statutes, thus :

“ No action shall be brought to charge any person—

“ *First*, for a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, made with intent that such other may obtain thereby credit, money, or goods ; nor,

“ *Secondly*, upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy ; nor,

“ *Thirdly*, upon a promise of a personal representative, as such, to answer any liability of his decedent out of his own estate ; nor,

“ *Fourthly*, upon a promise to answer for the debt, default, or misdoing of another ; nor,

“ *Fifthly*, upon any agreement made in consideration of marriage, except mutual promises to marry ; nor,

“ *Sixthly*, upon any contract for the sale of real estate, or any lease thereof for longer than one year ; nor,

“ *Seventhly*, upon any agreement which is not to be performed within one year from the making thereof. Unless the

promise, agreement, etc., or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in writing; it may be proved . . . or disproved, etc.”

We have seen already how narrowly the introductory words “no action shall be brought” are confined to their literal import.¹ The last clause does away with the inconvenient precedent in the Leading Case of *Wain v. Warlters*. The retention of the word “signed” leaves in force the English authorities, under which the signature need to be set down at the end.

Where an agreement within the statute is written in the first person as to one party, and signed by him, and the other party signs below, so that his name does not grammatically fit into the agreement, he may yet be charged in an action, having signed at least a “note or memorandum.”²

The first subdivision, re-enacted from Lord Tenterden’s act, has been passed upon three times. It was held not to embrace a false representation made knowingly and with fraudulent intent, where the action might sound in tort.³ And where an auctioneer, selling an article of a stranger, found the buyers suspecting it to be stolen (and so it afterward turned out), announced that “he knew the party well, and he was all right, and he (auctioneer) would warrant that his title was good,” the representation was deemed not within the statute, not being made to enable the stranger to obtain credit, but “more for the benefit of the appellant himself.”⁴

¹ See *supra*, Sec. 88 and Sec. 130, n. 19^a.

² *Winn v. Henry*, 84 Ky. 48. See *Prather v. McDowell* (Sec. 88, n. 6), as to unconnected signature.

³ *Warren v. Barker*, 2 Duv. 155, statute applied; only a fraudulent combination, it seemed, would take the case out of it. To let fraud take the case out is the rule in Michigan; the contrary rule governs in Massa-

chusetts and Indiana. In *Smith v. Fah*, 15 B. M. 448, a promise that one would faithfully collect notes was deemed to be within this clause, but it is clearly within the original act, as a promise to answer for the default of another.

⁴ *Dent v. McGrath*, 3 Bush, 174. Can be sustained on the ground that the statute says nothing of representations of title.

The second clause has been passed on twice;⁵ the third, it seems, not at all; the fifth only once, in a case plainly within the law.⁶

We have already discussed⁷ the sixth subdivision as far as it affects the rights of the buyer of lands. It was held twice, at an early date, that the promise of the purchaser, though in writing, to pay for lands sold by parol, is without consideration and therefore unenforcible, though the owner is still willing to carry out the parol sale by a conveyance.⁸ In the second of these cases it was said that an entry on the auctioneer's book is insufficient unless it be signed by "some person holding competent authority;" but the report is too meager to show whether authority from the buyer or from the seller is meant. The purchasers at chancery sales are held, though there is no writing on either side, in accordance with the old practice of the courts and the statute which says that the purchaser "shall give bond."⁹

An "agreement which is not to be performed within one year" means one which can not, in its nature, be performed within that time. The promise of a father to support a bastard child does not come within the statute, as the child might die within twelve months after the making of the promise.¹⁰ And so of a promise to board and clothe one for his lifetime.¹¹

Where commodities are loaned to be returned in three

⁵ See Sec. 145, n. 11, as to *Stern v. Freeman* (a letter written after coming of age to a stranger a sufficient memorandum). In *Petty v. Roberts*, 7 Bush, 416, the ratification was disallowed, but hardly any weight was given to the statute.

⁶ *Potts v. Merritt*, 14 B. M. 406.

⁷ See *supra*, Secs. 72, 83 and 141.

⁸ *Thomas' ex'r v. Trustees of Harrodsburg*, 8 A. K. Mar. 299, approved in *Martin v. McFadin*, 4 Litt. 240. The English authorities are followed, but the principle is somewhat shaken by a remark in *Bennett v. Tiernay*, 78 Ky. 580; and to say that the note of a purchaser for the price of land

sold by parol is *nudum pactum* is hardly compatible with the authorities gathered *supra* in Sec. 83 as to the nature of a parol sale, which seems to be good for all purposes except to sue on. The tenant's promise to pay rent on an unwritten lease for two years was held unenforcible in *Ragsdale v. Lander*, 80 Ky. 61.

⁹ Code of Practice, Sec. 697; and see *Watson's adm'r v. Violet*, 2 Duv. 332.

¹⁰ *Stowers v. Hollis*, 88 Ky. 544.

¹¹ *Howard v. Burgen*, 4 Dana, 137. And so of contracts to be performed after the death of any one. All this is in harmony with the law elsewhere.

years, the contract, though executed, can not be enforced on unwritten proof; but the borrower may be charged on a *quantum valebant* as upon a sale of the goods.¹²

A contract not to be performed within a year, though made elsewhere than in Kentucky, where perhaps no such "Statute of Frauds" is in vogue, can not be enforced in Kentucky, as the opening words of the statute, "no action shall be brought," touch the remedy.¹³

There is nothing in the subscription of stock to a turnpike road company, or similar corporations, that brings it within the Statute of Frauds. Such a subscription is good, though verbal.¹⁴

NOTE.—The modern law of pleading makes it necessary to allege a writing where a promise within the statute is the foundation of the action. To plead a promise, without saying more, implies a verbal promise. (*Smith v. Fah*, 15 B. M. 448.)

SEC. 168. SURETIES AND GUARANTORS. The clause of the statute regarding "a promise to answer for the debt, default, or misdoing of another," has been re-enforced by another: "No person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal, or if the principal do not write his name, then by his sign or mark, made in the presence of at least one credi[ta]ble attesting witness."¹ Where the authority is given by parol, a ratification of the instrument executed under such authority, also by parol, can not avail.² The act extends to bail bonds given in criminal cases to the Commonwealth; and such a bond is void as to the surety, though he was present in court and directed some one to sign his name to the bond in his own presence.³

In construing the words "the debt, default, or misdoing of another," the leading distinctions laid down by English and

¹² *Montague v. Garnett*, 2 Bush, 298.

¹ Now Gen. Stat., Ch. 22, Sec. 20.

¹³ *Kleeman & Co. v. Collins*, 9 Bush, 460.

² *Ragan v. Chenault*, 78 Ky. 545.

³ *Billington v Commonwealth*, 79

¹⁴ *Bullock v. Falmouth T. P. R. Co.*, 85 Ky. 184.

Ky. 400.

American courts have been observed. The promise must be to the creditor, not to the debtor, to fall within the statute. The "other" must remain bound, and it must be his "debt," etc., that is, the consideration must move to him. Where the defendant, in order to clear his own lot from a lien to a remote vendor, had agreed by word of mouth to pay the remainder of the purchase price, it was adjudged against him, though a note had been given for it by an intermediate party, and though the defendant might already have paid the price.⁴

One man may in his name and on his credit buy goods which he wishes some one else to receive and enjoy, and the debt for the price would be that of the former, not of the latter. And why can not two men order goods which are to be delivered to only one of them? Here we come on disputable ground. Where A., an insolvent, bought goods from the plaintiff, and on his refusal to deliver the goods by reason of A.'s insolvency, B. afterward promised to pay the price and consented to have it charged to himself, this promise was enforced without a writing, and the entry on plaintiff's day-book was admitted as evidence of the credit given to B.⁵

Another class of close cases under the statute arises where, after a distraint or attachment of A.'s goods for A.'s debt, B. agrees to pay a certain sum to have the goods released. Such a promise is within the statute, unless at the time that it is made A. himself be released from the debt.⁶ Both of these Kentucky rulings are in line with the weight of American law, and the other rulings under this branch of the statute hardly touch upon disputed ground.⁷

⁴ *Hodgkins v. Jackson*, 7 Bush, 342. Same principle in *Cfeel v. Bell*, 2 J J. Mar. 309; is supported by *Roberts on Frauds* and *Starkie on Evidence*.

⁵ *Leisman v. Otto*, 1 Bush, 225. In this case the plaintiff had at B.'s request taken ineffectual steps to coerce the debt from A., thus recognizing him as a debtor, but was not held estopped thereby.

⁶ *Lieber v. Levy*, 3 Metc. 392; *a fortiori*, where such promise is made

under threat of attachment. (*Jones v. Walker*, 13 R. Mon. 356.) Lord Mansfield disregarded the statute where, after a distraint made for rent, a broker interested in the goods promised to pay the rent if allowed to remove the distrained goods.

⁷ In a very late case, *Livers v. Nicholl's adm'r*, May 7, 1890 (11 Ky. Law Rep., 1000), the Superior Court held outright, that where a direct consideration moves to the promisor, his

The learning on guaranties of promissory notes has become less important since the signature of a stranger on the back of a promissory note can no longer be filled up with words of a guaranty.^{7a}

More important are the written guaranties, either single or or continuing, by which one man seeks to obtain credit for another. The Court of Appeals has gone far in requiring from the party to whom the guaranty is addressed a notice of its acceptance to the guarantor. A letter written by the defendant in guaranteeing any purchases which his son might make in a named city, though addressed to one firm, may be acted on by any other firm at that place, but such firm must notify the writer that his guaranty is accepted and credit given upon the strength of it. A declaration not alleging such notice was held defective; but there is no necessity to bring suit first against the principal debtor with the diligence needful to bind the assignor of a note,⁸ or at all.

Even where the parties addressed in a letter of credit themselves advanced money to the party recommended, the writers were held not bound, not having been notified till the latter had become insolvent; the case for the defendants being strengthened by the interval of two years between the letter of credit and the date of the advances made upon it.⁹

So far the decisions are plain enough, but the doctrine was

promise to answer for the default of another is not within the statute. The appellant being the agent and creditor of W., for whom he tried to collect the purchase price of a chattel in order to apply the money to *his own claim against W.*, agreed verbally to indemnify appellee, the purchaser, against loss of the chattel by superior title. A judgment against him on this indemnity (though W. remained bound) was affirmed.

^{7a} Some language in *Williams v. Obst*, 12 Bush, 266, seems to intimate that, if such note be discounted in bank before maturity, the blank signatures on it would be turned into

guaranties. In *Kellogg v. Dunn*, 2 Metc. 215, a case arising before the Gen. Stat. (see *supra*, Sec. 163, n. 6), we only find that the guarantor's liability is not that of a co-obligor, but not how his liability is fixed. In *Levi v. Mendell*, 1 Duv. 71, the blank indorsement of a stranger being filled up as a guarantee, according to the law of that time, an action against him was sustained without notice of the non-payment of the note having been given to the guarantor.

⁸ *Kinchelo v. Holmes*, 7 B. M. 5.

⁹ *Bell & Terry v. Kellar*, 13 B. M. 881.

applied in another case, in which under the circumstances the guarantors could not expect that a notice would ever be served upon them. A banker, being threatened with a run, the defendants, to avert it, wrote, signed, and published the following card: "Oct. 1, 1857. We, the undersigned, agree to guaranty the depositors of W. E. C. in the payment in full of their demands against said C., on account of money deposited with him. We have entire confidence, etc." The court, in a suit by one of the depositors, held (1) that the guaranty was addressed to each and could be accepted by each for himself; (2) that the contract was stated well enough to satisfy the Statute of Frauds; (3) that forbearance by a depositor was a good consideration as to him; (4) that he had only to "forbear" till the banker closed his doors; *but* (5) that the petition was defective in not stating a *notice* by the plaintiff to the guarantors that he had accepted their guaranty, and that the circumstances of the case did not show a waiver of such notice.¹⁰

While a guarantor must be notified that credit has been given, by the sale of goods or otherwise, upon the faith of that security, he need not be notified of the principal's default in payment, but may be sued at once on the happening of such default.¹¹

SEC. 169. WARRANTIES. Covenants of title are construed in Kentucky as elsewhere. The statute dispensing with needless verbiage in covenants of warranty, and declaring the words "with warranty" in a deed to constitute a general warranty, can hardly be said to change the law.¹ Where the warrantor, in order to have a grantee pay the arrears of purchase money, in a new bond with surety, indemnifies him "against all loss, cost, or damage growing out of defect of

¹⁰ Steadman v. Guthrie, 4 Met. 147.

¹¹ Lowe v. Beckwith, 14 B. M. 184; case of continuing guaranty. Wilde v. Haycraft, 2 Duv. 809; guaranty construed as for a single purchase of goods; all payments by the principal must be applied to that purchase;

each guarantor was to be liable for his *pro rata* only, not *in solido*; it was held, under Sec. 88, old Code (now Sec. 26), that a joint suit looking to separate judgments would lie against all.

¹ Gen. Stat., Ch. 24, Secs. 5, 6, 7.

title," such bond will be construed like a warranty, as securing only the return of the price paid, not the value of the land at a later day.²

The common law implication of a warranty during the grantor's life from the words, *dedi et concessi*, never prevailed here;³ but a warranty was implied in a deed of partition or of exchange,⁴ and perhaps would now. And a doctrine has been worked out, that one who sells land impliedly undertakes that he has *some* though not the paramount title, and that he is able to sell his own title, which seems to imply a covenant against encumbrances made by the grantor himself.⁵

As to warranties on the sale of chattels, the law of Kentucky recognizes the implied warranty of title where the seller is in possession. Though, generally speaking, the plaintiff in an execution does not warrant a perfect title to the purchaser, yet where the plaintiff intermeddles by ordering a levy on certain chattels, *assumpsit* lies against him in the language of the old cases, on behalf of the purchaser, who loses his money.⁶

The peculiar development of the law of Kentucky on implied warranties in the sale of notes and bonds is given in Sections 163–166. The warranty of quality of chattels sold remains to be treated.

The leading case of *Chandelor v. Lopus* is understood by many as deciding that the buyer of a thing, which turns out different from what the seller represents it, can not recover, except on an express warranty, or a *scienter* amounting to deceit;⁷ but nothing, said there, requires the warranty to be express, and the court must determine in each instance what

² *Robertson v. Lemon*, 2 Bush, 301.

³ *Steele v. Mitchell*, Pr. Dec. 87.

⁴ *Ibid.*, *Venable v. Beauchamp*, 8 Dana, 821 (the warranty operated as estoppel).

⁵ *Sinking Fund Commissioners v. Northern Bank of Kentucky*, 1 Met. 174, 192.

⁶ *Hackley's ex'rs v. Swigert*, 5 B. M. 86, relying on *Sanders v. Hamilton*, 8 Dana, 552. See *supra*, Secs. 120, n.

12, and 127, n. 9, as to rights of purchaser.

⁷ (The old judges thought even knowledge insufficient.) *Waters v. Mattingly*, 1 Bibb, 244, holding that a seller, representing the thing sold as sound when he does not know that it is, does so at his peril, and is liable in tort, or to have the sale rescinded, is overruled in terms in *Stewart v. Dougherty*, 8 Dana, 480; description

words⁸ and what *surrounding circumstances* amount to a warranty, and will often deem the sale of an article by name or description in the invoice or bill of sale as an affirmation and warranty that it belongs to the class thus described, and is not so far mixed with other things as to lose its name and character;⁹ or, where an article is bought for a certain purpose known to the seller, an implied warranty may be found of its fitness for that purpose;¹⁰ or fraud in selling it, when the seller knows it to be unfit for it.¹¹

The modern doctrine as recognized in Kentucky is this: No special words are needed to make a warranty, and any words of representation (not of belief or opinion) which in the course of negotiating a sale of goods are used to bring the trade to a close, and are so understood by the buyer, are a warranty. The authorities,¹² beginning with *Chandelor v. Lopus*,

and warranty being distinguished, and thus a warranty of a negro as "sound and a slave for life," is not a warranty of the seller's title. (*Bayse v. Briscoe*, 18 B. M. 474.)

⁸ Cases on warranties in a bill of sale may turn on *expressio unius exclusio alterius*, as where a bill of sale of a slave stated his age, but warranted title and soundness, was held not to warrant the age. (*Banfield v. Burton*, 7 B. M. 108.)

⁹ Where the plaintiff sold certain stacks on a farm for hemp, and they were so much mixed with weeds as no longer to pass for hemp, he could not recover at all, there being no sale of hemp. The court below instructed the jury to pass on each stack by itself, which the Court of Appeals said was too favorable to plaintiff, "if a material part of the stacks" contained the admixture, the contract of the seller was not complied with. (*Fogg's adm'r v. Rodgers*, 84 Ky. 558.)

¹⁰ Where a Durham cow was sold

for \$1,000, a price indicating her being bought for a breeder, and she had been twice with calf, so there was no deceit, nor a breach of a warranty against barrenness, a warranty that she would calve again was not implied. (*Scott v. Renick*, 1 B. Mon. 64.)

¹¹ Where late in the civil war a drafted man bought a slave, notoriously for a substitute in the army, for \$700, and the owner knew that the slave was undersized, and had been rejected before by the authorities, an action of deceit for the whole price paid was sustained. (*Miller v. Gaither*, 8 Bush, 153.)

¹² Of Kentucky cases: *Bacon v. Brown*, 3 Bibb, 35; no form of words necessary for a warranty; *Dickens v. Williams*, 2 B. M. 374; affirmation of a fact in a bill of sale warrants it; *Lamme v. Gregg*, 1 Met. 444, applies this to verbal contracts "where the affirmation as to the kind, quality or condition of the article sold is made during the trade."

are reviewed in an elaborate opinion of Judge Holt (March, 1888), who proceeds:

"Here A. is selling a lot of mules to B. The trade is in progress, and the contract being made. The latter asks the former, 'Are they *all right*?' The answer is, 'They are.' It is urged that this statement is too indefinite to constitute a warranty of soundness, and that the petition in stating it only is defective. . . . Business and trade forbid much technicality. . . . Can there be any doubt how men generally would have understood the question and answer?" And the court enforces the words above given as a warranty of soundness.¹³

The distinction in favor of one who orders goods to be manufactured over a buyer of goods ready for sale is acknowledged.¹⁴

An affirmation as to the quantity in "cost and carriage" of a stock of goods sold was held binding on the seller; though the suit was in deceit and there was no proof of a *scienter*, the court proceeded on the ground that in such a matter the buyer had the right to trust in the statements of the seller, and that the latter, if he did not know the quantity sold, should not undertake to state it positively.¹⁵ But in an early case, where one warranted the quantity of a cargo of pork, he was not held to an undertaking that all of such quantity was sound.¹⁶

The right of the buyer to rescind the trade for breach of warranty was said to be a disputed point, and the Court of

¹³ *McClintock v. Emick*, 87 Ky. 160. In *Smith v. Miller*, 2 Bibb, 617 (1812), the suit was in tort for deceit; an affirmation could not be recovered on without a *scienter*; and the court seems not to have held it equivalent to a warranty.

¹⁴ *Cook v. Gray*, 2 Bush, 119, relying on a case in 2 J. J. Mar. and on *O'Bannon v. Rolfe*, 7 Dana, 329. This seems to overrule *Baird v. Mathews*, 6 Dana, 129, where a receipt for \$2,926 paid for "616 barrels of superfine flour" was held not to be a warranty of the grade; but the case is not re-

ferred to in the modern opinion. The latter is undoubtedly in line with the modern English and American laws.

¹⁵ *Morehead v. Eades*, 3 Bush, 121, re-establishing as to quantity at least the case of *Watson v. Mattingly*, overruled in *Stewart v. Dougherty*. See *supra*, n. 7.

¹⁶ *Jones v. Murray*, 3 Mon. 82; the pork being sold by the cargo, a warranty of soundness of provisions was not implied, as in a sale for immediate consumption.

Appeals chose to follow the Supreme Court of the United States in denying the right.¹⁷

The *implied* warranty of title in a chattel is, like a covenant of seizin, broken as soon as made, if the seller has no salable title, and limitation against an action on such warranty runs from the sale.¹⁸ The measure of damages on an express (or implied) warranty of title, in the absence of fraud, is the price paid with interest from the time that the purchaser loses the enjoyment through paramount title.¹⁹

SEC. 170. FIRE INSURANCE. In 1870 the legislature established an Insurance Bureau, and enacted a law "for the incorporation of Fire, Marine, etc., and all other except Life Insurance Companies." But few companies have been formed under it, as a legislative charter is so easily gotten. But from its twentieth section down the law applies also to home and foreign companies doing business in Kentucky, though not organized under it, and imposes, aside of taxes, duties on all insurance companies for the safety of the policy holders; and this is made clearer by an act of March 21, 1870, subjecting all companies to the new insurance laws.¹ It is unlawful for any company, not having complied with the law, to do business in Kentucky, and though it can not take advantage of its own wrong by refusing to pay a policy delivered in the State, yet a premium note taken in return for such policy is void.²

I. *Insurable and Insured Interest.* Where the charter of a

¹⁷ Case of a clock warranted to be a good time-piece. (*Lightburn v. Cooper*, 1 Dana, 273, referring to *Thornton v. Wynn*, 12 Wheat. 184.)

¹⁸ *Chancellor v. Wiggins*, 4 B. M. 201.

¹⁹ *Wood's adm'r v. Wood's dev's*, 1 Met. 512, 518.

¹ Act of March 12, 1870. App. to B. and F. G. St., pp. 63-86, including some amendatory acts. The insurance laws are exempted from repeal by the General Statutes. The act of March 21, 1870, is found in Appendix, p. 86.

² *Franklin Ins. Co. v. Louisville, etc., Packet Co.*, 9 Bush, 591; the Kentucky Court of Appeals held in like manner on a premium note given for insurance in Indiana in disregard of the insurance law of that State. (*Ford v. Buckeye State Ins. Co.*, 6 Bush, 133.) But the act does not dissolve certain companies chartered before 1870, which are strictly mutual and can not conform to the requirements of the act without reorganizing on a new footing (*Louisville German M. F. I. Co v. Commonwealth*, 9 Bush, 395.)

mutual company subjects the lands and houses of the insured to a lien for their assessment, a husband can not insure the house of his wife in his own name, notwithstanding his inchoate right of curtesy.³

On the extent of recovery by one having an insurable interest less than an absolute ownership there are two decisions not quite in harmony. The plaintiff, having had issue born alive before any of the statutes lessening the husband's rights in the wife's lands, insured the whole interest, which he held in her right, in his name; and though he owned only a life estate therein, the court said: "If the assured had an insurable interest at the time of the insurance and also at the time of loss, he has a right to recover the whole amount of damage to the property . . . without regard to the value of the assured's interest in the property."⁴ But where a widow insured a house, which had descended on her infant children, as her own, she was allowed to recover only the value of her dower, and the amount of a lien note against the property which she had taken in with her own funds.⁵ Other decisions on insurable interest⁶ yield nothing peculiar to Kentucky.

Reversing the Superior Court, the Court of Appeals holds that a change of ownership by the death of the assured is not within the well-known clause which avoids the policy if "*any change takes place in the title*" of the thing assured.⁷ Till the sale is confirmed⁸ a judicial sale does not work a change of title in a house.

³ *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. 526.

⁴ *Franklin M. and F. Ins. Co. v. Drake*, 2 B. Mon. 47.

⁵ *Hartford Ins. Co. v. Haas*, 87 Ky. 531. See *supra*, Sec. 141, about court's refusal to reform the policy.

⁶ *Fireman's Ins. Co. v. Powell*, 13 B. M. 811, 321 (insurable interest in attached chattel—a steamboat—of him who bonds it); *Protection Ins. Co. v. Hall*, 15 B. M. 411, 481 (builders for their lien on house, the policy reading "on their work done;" good);

Ætna Ins. Co. v. Jackson, 16 B. Mon. 242, 269 (vendor of goods held back for price.)

⁷ *Richardsons's adm'r v. German Ins. Co.* (Feb. 20, 1890), 12 Ky. Law Rep. 37.

⁸ *Manhattan Ins. Co. v. Stein*, 5 Bush, 651, 659. A deed of assignment for the benefit of creditors is not a transfer of the interest in the assured, any more than a mortgage. (*Phoenix Insurance Co. v. Lawrence*, 4 Met. 9.)

II. *Representation and Warranty.* Following the lead of other States Kentucky, in 1874, directed by law that "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy."⁹ It was held at one time that a proviso in the policy, that all representations shall have the force of a warranty, is not in conflict with any rule of policy and therefore overrides the rule for construing the statute; but this view has been since expressly overruled.¹⁰

The words, "occupied as a family residence," following upon the location of the insured house, is within the statute and can not be taken as a warranty that the house will be thus occupied during the term.¹¹ Where one who owns a life estate in the ground on which the insured house stands, and part of the fee therein, and has paid for the house with his own means and can have it allotted to himself in a partition, it is not a material misrepresentation for him to call it unconditionally his own.¹²

A representation that the assured has an unencumbered title, where he has bought at a judicial sale and paid no part of the purchase money, is materially false; whether the dower belonging to his wife by reason of a previous marriage would by itself be fatal, under a representation that no one else had an interest, is left in doubt.¹³

The untrue statements in an application are often caused by the zeal of agents anxious to get their commission, and are

⁹ Act to add Sec. 22 to Ch. 22 of Gen. Stat., see B. and F. G. St., p. 808; see as to effect of agent insisting on untrue answers, *Western Assurance Co. v. Rector*, 85 Ky. 294. But the assured was not excused in this case for keeping gunpowder in his stock of merchandise, though the agent had told him he might do so.

¹⁰ *Germania Ins. Co. v. Rudwig*, 80 Ky. 228, a life insurance case, overruling very properly *Farmers and Drovers Ins. Co. v. Currie*, 18 Bush,

812. It is the policy of the law not to allow contracts to be made by which the unwary may be entrapped.

¹¹ *Imperial Fire Ins. Co. v. Kieran*, 88 Ky. 408.

¹² *Kenton Ins. Co. v. Wigginton*, 11 Ky. Law Rep. 539.

¹³ *Security Ins. Co. v. Bronger*, 6 Bush, 147. The same was held in *Farmers and Drovers Ins. Co. v. Currie*, *supra*, which is probably still good law on the merits, though not as construing the act of 1874.

deemed the acts of the insurer by which he is estopped. Here, then, a law passed in 1886 steps in which directs "that whoever solicits insurance, etc., or transmits . . . an application for, or a policy to or from, [a] company, or advertises that he will, etc., shall, any thing *in the application or policy to the contrary notwithstanding*, be held to be an agent for such company to *all intents and purposes*, unless . . . he received no . . . compensation . . . for such services from such company or its accredited agents, or . . . is the . . . agent of the insured."¹⁴

III. *Conditions Subsequent.* What is a breach of the condition against change in the title has been already discussed. The court has construed the clause that the property must not become "vacant and unoccupied" also quite benignly to the assured. Where the owner of a dwelling-house, the tenant having left it, while waiting for another tenant put a servant into one room adjoining the main building, with access to the whole house, it was deemed a good occupancy.¹⁵ The keeping in store of prohibited articles (such as gunpowder) is said not to render a policy void, but only to suspend it.¹⁶ As to waiver of proofs by conduct of the insurer or his agent, the Kentucky decisions are in line with the modern tendency in favor of the assured.¹⁷

IV. *Other Insurance.* Insurance by other underwriters may be a defense either on the ground of concealment (a misrepresentation as to it is always material), or it may avoid the policy under a condition; or it is a defense *pro tanto* to a policy which undertakes to pay only a part of the loss in proportion to the whole sum insured. The condition as to subsequent insurance without consent or notice, usually winds up, "the policy shall be of no binding force on this company." Hence it becomes void only at the insurer's option. Now, if the second policy on the same house or stock is effected through the same agent who made out the first, being agent for both, the company issuing the first policy is notified of the additional

¹⁴ B. and F. Gen. Stat., Appendix, p. 86.

¹⁵ Imperial Ins. Co. v. Kiernan, *ubi supra*.

¹⁶ Phoenix Ins. Co. v. Lawrence, *ubi supra*.

¹⁷ Kenton Ins. Co. v. Wigginton, *ubi supra*.

insurance, and, if dissatisfied, ought to cancel it and return the premium, and can not claim a defeasance after a loss has taken place.¹⁸ Nor can the second company complain, for, by issuing its policy with full notice of previous insurance, it has given its consent thereto, and there was certainly no misrepresentation.¹⁹

But where two policies are obtained from different companies, through different agents, taking effect at the same time, the assured can not avoid the clauses in either policy against previous and subsequent insurance by showing that the other was neither previous nor subsequent, but contemporaneous.²⁰

But the right of the insurer to annul his policy on account of additional insurance is not lost by his assent to and co-operation in an adjustment of the loss, nor by his canceling of the policy after the occurrence of the loss and returning the unearned portion of the premium.²¹

V. *Some other Points.* Where an action on a fire loss is defended on the ground that the assured set the house on fire, or connived at such action, the plea need not be sustained by any greater proof than any other affirmative averment in a civil case; the jury need not be convinced "beyond a reasonable doubt."²²

In fixing the amount of the loss the usual words of the policy, "true and actual cash value," do not mean the price at which the thing destroyed by fire can be replaced; as it would often be impossible to replace it in its old and perhaps decayed condition; but the price at which, immediately before the fire, it could have been sold for cash.²³

¹⁸ *Von Borries v. United L. F. and M. Ins. Co.*, 8 Bush, 133.

¹⁹ *Kenton Ins. Co. v. Shea*, 6 Bush, 174. There was a condition against previous insurance which was enforceable as such at the time.

²⁰ *Manhattan Ins. Co. v. Stein*, 5 Bush, 651. A case of forfeiture for further insurance without notice or consent came before the Court of Appeals in two appeals in the same case in *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150, and *Same v. Same*, 88 Ky.

7. The forfeiture was here enforced, though the subsequent policy is voidable for not giving notice of the first; but such a forfeiture can not be enforced where an insurance agent, without the consent of the assured, "places" additional insurance. (*London and Lancashire Ins. Co. v. Turnbull*, 86 Ky. 230.)

²¹ *Baer v. Phoenix Ins. Co.*, 4 Bush, 242.

²² *Ætna Ins. Co. v. Johnson*, 11 Bush, 587. ²³ *Ibid.*

The condition of a policy of fire insurance, that the company shall not be liable for any loss under the policy if default shall have been made in paying an installment of the premium note, is valid, though by the contract this note remained binding on the assured.²⁴

The limitation of one year, within which by the terms of the policy a suit on it may be brought, is, unlike a statutory limitation, extended one day when the last day of the year falls on Sunday.²⁵

SEC. 171. LIFE INSURANCE. The act of 1874, on Representations and Warranties, and that of 1886, treating all paid solicitors as agents of the insurer, bear oftener on life than upon fire risks.¹ There is a strong effort to sustain a life policy on which premiums have long been paid in good faith. Thus, where the insurer pleaded a misstatement of the life's age by three years, the court was unwilling to set aside a special finding for the plaintiff, though it ran counter to a well-proved register of births.²

The striking feature in the Kentucky law of life insurance is the distinction made between premiums or premium notes, for default in which the policy may be forfeited, and default in such indebtedness which the policy calls "loans." The insurer is taken at his word; the note is a loan for which the policy is mortgaged, and the court relieves against the forfeiture by simply deducting the amount due on the loan from that to be paid on the policy, and this must happen always where a policy is *commuted* upon the basis of payments already made; it is then a "paid up" policy, and any notes which remain outstanding against it are only evidences of debt, not of further

²⁴ *Blackerby v. Continental Ins. Co.*, 88 Ky. 574. This would be very different in life insurance; see next section.

²⁵ *Owen v. Howard Ins. Co.*, 10 Ky. L. R. 608.

¹ See *supra*, Sec. 170, nn. 9 and 14.

² *Germania Ins. Co. v. Rudwig*, 80 Ky. 223. In the same case the life's removal to the South, forbidden by

the policy, was held to be condoned by the acceptance of subsequent premiums. But this is now the law everywhere. To prevent a policy from lapsing under the charter of a mutual company, where a member should die "without widow or child," the last word is construed to embrace a grandchild. (*Duvall v. Goodson*, 79 Ky. 224.)

premiums which must be paid to keep the policy alive.³ The doctrine was carried to its utmost limit in 1878. The commuted policy and notes nowhere spoke of a "loan." The life had been insured for the benefit of his wife, on the ten years' plan, in the sum of \$10,000, the premiums being paid half in cash and half in notes, with the right to commute the policy after two annual payments at one tenth for each payment, "provided such surrender is made to the company within twelve months from the time of" default, the new policy to be "subject to any notes" outstanding for premiums. The understanding to pay one tenth for each year's premium that should be paid was repeated in another part of the policy, without mention of the previous surrender of the old policy. Under this policy four premiums were paid, and the interest on the notes was kept up during the time. When the fifth premium fell due the decedent paid the greater part of the one half payable in cash, and gave a short note payable in bank for a sum made up of the residue of that half, advance interest on premium notes, and interest for the time the premium had to run, winding up the instrument thus: "If the amount of this note is not paid when due, the policy shall be null and void." Having met the fifth premium in this way, he got the usual renewal receipt. The note was never paid, neither was payment demanded, nor the cash paid on the fifth premium returned; nor was the policy surrendered at any time or a paid-up policy demanded. The "life" died three years thereafter. It was held that the forfeiture in the short note could not be enforced, and that the widow was entitled to five tenths, subject to all the indebtedness on the notes.⁴

Assessment companies have been held to a strict pursuance of the organic law in making their assessments or calls;

³ St. Louis M. L. I. Co. v. Grigsby, 10 Bush, 810 (1874).

⁴ Montgomery v. Phoenix M. L. Ins. Co., 14 Bush, 51, followed in Johnson v. Southern Mutual L. Ins. Co., 79 Ky. 408. Still less can a commuted policy be forfeited for non-

payment of interest on premium notes, where the policy-holder is entitled to a dividend, which would, if applied, have been likely to discharge the interest. (Northwestern L. I. Co. v. Fort's adm'r, 82 Ky. 269.)

the call being made by an officer, where the charter demanded action by the board, it was held void, and the failure to meet it could not work a forfeiture of membership.⁵

And such a forfeiture is not self-acting; the society has the option of waiving it and does waive it by demanding an assessment which accrues after the supposed forfeiture.⁶

The same liberality as in ordinary life insurance has not been allowed in dealing with accident insurance. Where a railroad employe had given an order on his employer to cover insurance for one year, in four periods, and the policy stipulated that the insurance should be valid only for the periods (after the first) for which the premium was actually paid, the insurance company was exonerated, though it had not returned the order, nor made any effort to collect it, and though before the death of the person insured the railroad company owed him more than enough to cover the premium for the whole year.⁷

A clause in a charter, giving a fund arising on the death of a member to his "wife and children," is construed as giving them in the proportion in which the personal estate is distributed between them, that is, one third to the wife, two thirds to the child or children.⁸

NOTE TO SECTIONS 170 AND 171.—The Kentucky decisions upon Marine Insurance, which also touch upon General and Particular Average, seem to be in full harmony with the general English and American law.

NOTE.—As to change of beneficiary see note under Section 118; as to rights of creditors, Section 128, *sub fine*.

SEC. 172. COMMON CARRIERS AND OTHER PUBLIC TRADES.
There is no statute in Kentucky limiting the liability of com-

⁵American M. A. Society v. Helburn, 85 Ky. 1. An executive committee of the board would have satisfied the charter.

⁶American M. A. Society v. Quire, 8 Ky. L. R. 101. It was held that though under the charter the notice of assessment may be "sent," yet the thirty days' time for payment must run, not from the time of mailing the

notice, but from the time of its receipt by the member.

⁷Bane v. Traveler's Ins. Co., 85 Ky. 677.

⁸McLin v. Calvert, 78 Ky. 472. Contrary to the well-known rule which gives to the wife a child's share. The latter is followed in Gaines v. Kentucky Granger's M. B. S., 11 Ky. L. R. 580. (Superior Ct.)

mon carriers or allowing them to limit it by contract otherwise than they might by the rules of the common law. There is a very mild statute for the protection of innkeepers.¹

The railroad act of 1880 requires each company, in order to prevent extortion, to keep posted both a schedule of the maximum rates allowed by law and of the rates actually charged.² An act of 1882 undertakes, mainly by its second section, "to prevent extortion and discrimination" in both freights and car toll and in passenger fares, but reserves in its third section the right of the companies to issue commutation, excursion, and thousand-mile tickets.³ The amendatory act of 1890 repeals Section 2 of that act, and by way of substitute therefor makes it unlawful for any corporation operating a railroad to "directly or indirectly, by any special rate, rebate, drawback, or other device, . . . charge . . . or receive from any person . . . a greater or less compensation for any service rendered . . . in the transportation of passengers or property than it charges . . . or receives from any other person . . . for like . . . service in . . . like kind of traffic, under substantially similar circumstances and conditions." Another section of the act requires the same facilities and rates to be given to one connecting line that are given to any other.⁴

In passing on the liability of common carriers for goods delivered to them for transportation, the Court of Appeals of Kentucky has not otherwise struck out on any line of its own, but it has, on the disputed question of contracts for limiting the common law liability by contract, sided with the Supreme Court of the United States against the Court of Appeals of New York⁵ in holding that a common carrier can not shield

¹An act of February 1874 (B. and F. G. St., p. 781) authorizes an innkeeper, who has a good iron safe or vault, to escape responsibility for such money, bank notes, jewelry, articles of gold and silver, precious stones or bullion, which guests will not deposit in his safe, by posting a copy of the act in every public room and guest's bedroom in his inn; but he will, notwithstanding the act, be

liable for any loss to a guest "caused by the theft or neglect of the innkeeper or any of his servants." No decisions under the act are reported.

² B. and F. G. St., p. 1019.

³*Ibid.*, p. 1021.

⁴ Sess. Acts, 1889-90, p. 25.

⁵ See *Railroad Co. v. Lockwood*, 17 Wall. 357, and the contrary decision of New York Court of Appeals between the same parties.

himself against responsibility for loss arising from his own negligence and that of his *servants and agents*. And, in applying this same principle to a telegraph company, and to the well-known stipulations in a night or half-rate dispatch,⁶ the court disregarded the excuse, that by paying a higher rate the customer could have a fuller measure of responsibility. After conceding that a telegraph company is not a common carrier, and not therefore liable at all events for every miscarriage, the court (Judge Holt) proceeds: "It is, however, a public agent; . . . carefulness and fidelity are essential to its character as a public servant, and public policy forbids that it should abdicate as to the public by a contract with the individual. He is but one of millions; . . . he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a contract under which a public agent seeks to shelter himself from the consequences of his own wrong and neglect." The company failed in this case to deliver the message at all; a plainer case of neglect than a mistake in its wording would have been.⁷

As to common carriers themselves, the rule is thus laid down: (1) "The weight of authority, both in this country and in England, is that by receiving and accepting the bill of lading the consignor becomes bound by its terms, in the absence of fraud and mistake. (2) The doctrine that common carriers can limit their common law liability by special contracts has received the sanction of this court (see 2 Duv. 554;

⁶Smith v. Western Union Tel. Co., 83 Ky. 104. The victory in the particular case remained with the company on the question of damages. The message was from a broker to his principal, advising him of an additional purchase of stock, which required, in case of a decline, a further margin to be put up. The party addressed not learning of the purchase did not "put up," and lost his whole investment; the court disregarded a special verdict that "he would have put up the margin," as being a mere

guess, and deeming the damages too remote entered a verdict for the cost of the message, which was affirmed.

⁷We may consider the views expressed by the court in Camp v. Western Union Tel. Co., 1 Met. 164, that the company can by an *express* contract limit its liability, and that to guard against mistakes the customer should pay the extra half-rate for repeating, as no longer law, except where the mistake, delay, or non-delivery arises from causes not due to the neglect of the company's agents.

11 B. Mon. 336), but not to such extent as to relieve them from liability of themselves or their agents." The exception here was against fire while in transit, and the goods having been destroyed by fire, without negligence on the part of the railroad company, it was exonerated.⁸

A stipulation in a railroad bill of lading for live stock, that the owner must before removing an injured animal from the place of destination, etc., give a written notice to the company, is reasonable, and will be upheld.⁹ The carrier need not prove that the shipper read and fully understood the special contract, or that it was fairly and freely entered into; but if it does not appear affirmatively that the shipper "acted under duress," or that the contract was imposed upon him when he could not examine or understand it, he is bound as he would be by any other written instrument.¹⁰ Where the blank for the bill of lading has upon it an acceptance of its conditions to be signed by the shipper, and he has not signed it, and not read the conditions, he is not bound by them.¹¹ In these cases an express company was treated throughout as a common carrier, but in another case a judgment against the same express company was reversed, because the court below would not instruct the jury that it could lawfully, by contract, limit its liability to "fraud and gross negligence."¹² This is not in harmony with the other cases, and may be considered as overruled;¹³ yet it was not said that an express company is other

⁸ L. & N. R. R. Co. v. Brownlee, 14 Bush, 590. The carrier was held liable notwithstanding the contract in cases quoted below in n. 18.

⁹ Owen v. L. & N. R. R. Co., 87 Ky. 628. But by taking charge of an injured horse the agents of the company waived the necessity for a written notice.

¹⁰ Adams Express Co. v. Guthrie, 9 Bush, 78; see also *supra*, L. & N. R. R. Co. v. Brownlee, p. 598 (an exemption embodied in the bill of lading is presumably assented to).

¹¹ Adams Express Co. v. Nock, 2

Duv. 562: "the proof must be clear that the contract was fairly made and fully understood"—an instruction in these words led to a reversal in case quoted in n. 10.

¹² Same v. Loeb, 7 Bush, 499.

¹³ The other cases speak of "negligence," not of gross negligence, and in two subsequent cases, L. C. & L. R. R. Co. v. Hedger, 9 Bush, 650, and Rhodes v. L. & N. R. R. Co., *id.* 688, it is expressly said that a common carrier can not limit his liability to "criminal neglect," or to "gross negligence."

than a common carrier. The owner of a towboat, who undertakes to tow steamboats or barges over "the Falls," is not a common, but a private carrier, and liable for negligence only.¹⁴

A steamboat owner is not liable to a passenger who takes a state-room on the boat, either as a common carrier or as an innkeeper, for the watch, or jewelry, or money which he takes into his state-room, and which is there stolen from him.¹⁵

In a case involving the lien on a guest's baggage, it was said that the word "innkeeper" has a limited meaning in the law, and covers only those who hold tavern licenses.¹⁶ A man of course could not, by failing to take out his license, be excused from his common law duty to his guests; but that the house is kept in such a way that the landlord ought to take out a tavern license might be a test for subjecting him to the strict liability of an innkeeper.

The Court of Appeals having intimated¹⁷ that in the carriage of passengers the contract is rather inducement; and the tort the gist of the action, the liability for injury to passengers will be treated along with other instances of negligence.

¹⁴ Varble v. Bogley, 14 Bush, 698.

¹⁵ Steamboat "Crystal Palace" v. Vanderpool, 16 B. M. 302; it was said not to be baggage, being kept by the passenger under his own control. The Court of Appeals regretted that for want of a precedent it could not hold the boat as an innkeeper. There was really negligence in hav-

ing no lock or bolt by which the state-room could be locked from the inside. The rule here laid down would excuse the owners of sleeping-cars.

¹⁶ Southwood v. Myers, 3 Bush, 687.

¹⁷ McMurtry v. Kentucky C. R. R. Co., 84 Ky. 484.

CHAPTER XXVIII.

TORTS.

SEC. 173. Trespass on Lands.

SEC. 174. Torts to Personalty—Conversion.

SEC. 175. Injuries to Person and Character.

SEC. 176. Negligence at Common Law.

SEC. 177. Injuries Resulting in Death.

SECTION 173. TRESPASS ON LANDS. The old rule that one not in the actual possession of land can not sue a trespasser, except for the damage done to the reversion, and that one not in constructive possession can not sue the trespasser at all, was until 1854 strictly carried out. An act was passed in that year weakening the rule; it was left out in the General Statutes; but on the 13th of March, 1888, a much more sweeping act was approved, in these words: "The owner of any land in this State may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespasses, etc., notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass."¹

It was held, under the act of 1854, that the owner might sue for forcibly entering on the land and carrying off timber, though the land at the time was in the possession of a tenant.²

The new law may lead to the practice of trying titles in actions of trespass,³ and will compel plaintiffs in ejectment to join (as they may under Section 83 of the Code) their claim for damages with that for possession, as the limitation of five years now begins to run from the time of the damage done to the beginning of the suit for its recovery.

The act does not affect the mode of proving title. Where

¹ B. and F. Gen. Stat., Appendix, page 1.

² Holderman v. Middleton, 6 Bu. 45.

³ As was indeed done under the old law in Simon v. Gouge, 12 B. Mon.

156.

the plaintiff, as in the case of wild lands, can not show possession in himself or those under whom he claims, he will have to go back to the Commonwealth. But if there is an inclosure it will, by a fifteen years' claim to a surveyed and marked boundary, extend itself to such boundary though there be no paper title, and on such a possession trespass could be maintained before the new act.⁴

A sale of standing timber by quantity, without marking or identifying the trees, is executory only, and gives to the buyer no right to enter upon the land, and *quare clausum fregit* lies against him if he does.⁵ To take stone dug from land, and piled up in heaps, is deemed a trespass to the realty.⁶

Where timber was taken from the plaintiff's land willfully and against his protest, the Court of Appeals, to discourage such trespasses, allowed a verdict to stand which gave \$2.50 for each tree, though no higher value than \$1 had been proved.⁷ Where the trespass is in its nature lasting, such as the encroachment of a railroad, damages may at once be given for the resulting depreciation of the plaintiff's land.⁸

SEC. 174. TORTS TO PERSONALTY—CONVERSION. The rightful derivation of ownership in goods being known, some questions still remain to be answered in an action of trover. One of these is that of "accession;" that is, has the possessor or wrong-doer under whom he claims transformed the article belonging to another in such a way as to destroy its identity, and thus to make the new product his own? or has his labor been added to the material, and can the value of the improved article be recovered after a demand and refusal?

⁴ Farmer v. Lyons, 87 Ky. 421. In the early case of Owings v. Ulory, 3 A. K. Mar. 454, the title was derived from one having a twenty years' possession of an inclosure which extended itself to the boundaries of the deed or patent, the trespass being on the forest outside the inclosure.

⁵ Moss v. Meshew, 8 Bush, 189; see *contra*, Byassee v. Reese, 4 Metc. 373, where the trees had been marked, and

it was held (1) that such a sale for immediate removal is not a sale of an interest in land within the Statute of Frauds; (2) that it can not be enforced against a purchaser of the land without notice.

⁶ Ellis v. Wren, 84 Ky. 254.

⁷ Owings v. Ulory, *ubi supra*.

⁸ Elizabethtown, etc., R. R. Co. v. Combs, 84 Ky. 382, 393.

Where a party took timber from his adversary's lands, cut it up into fence rails and laid these down in a fence, the ownership was said not to be changed.¹ And where timber taken by the plaintiff willfully from the defendant's land was worked by the former into the frame of a flatboat, which the defendant got into his possession, a suit *de bonis asportatis* for the frame was decided in favor of the defendant, the owner of the material.² But the leading Kentucky case on the subject came before the Court of Appeals in 1829. The defendant in ejectment had *in good faith* worked a brick-yard on the disputed land, and the lessor of the plaintiff, when taking possession, appropriated the bricks on the place, both burnt and unburnt. In a subsequent action of trover the bricks, both burnt and unburnt, were at first adjudged to the owner of the land, but upon a rehearing Chief Justice Robertson, in a learned and lengthy opinion, held differently, and laid down this rule:

"If the material be so essentially changed as to prevent its renovation by individual agency, the owner has lost his right to it; if the elements of the material have not been changed, but the specific thing which they constituted can not be reproduced identically by individual operations, the owner of the material does not own the new species."³ The burnt brick should certainly belong to the brick-maker; but the "rule" is vague, almost unintelligible, and far too favorable to the wrong-doer.

The question came up again in 1880, in an action for the specific recovery of two thousand six hundred cross-ties, brought against the owners of a railroad who had bought them in good faith from a tie-maker who had cut them out of timber sold to him by trespassers who had taken it stealthily from the plaintiff's land. "The timber taken was worth in the tree from five to fifteen cents per stick, and when converted into

¹ *Miller v. Humphries*, 2 A. K. Mar. 448.

² *Burris v. Johnson*, 1 J. J. Mar. 96.

³ *Lampton's ex'r v. Preston's ex'r*, 1 J. J. Mar. 454; opinion on rehearing, 458. The only authority then

known as to "accession" in burnt bricks was a *dictum* in *Port v. Tuston*, 2 Wils. Rep. 172. The owner of the land, it was said, should have the unburnt bricks on paying for the molding.

cross-ties, each tie was worth thirty-four and a half cents." The court said that to make a case for the wrongful possessor there must be "accessions of other materials as well as skill and labor," or the increase by the latter alone must be "extreme," and adjudged the ties to the plaintiff, but intimated that if the suit had sounded in damages, the plaintiff might have been awarded less than the value of the finished product.⁴

Where chattels are encumbered by lien, the owner can in a suit against one, who even irregularly connects himself with the lien, recover as damages for the conversion only the value of his own net interest.⁵

The doctrine held in some other States, that the party wrongfully converting goods that fluctuate in the market may be charged with the highest price that they bear at any time between the conversion and the trial, is unknown in Kentucky, though it might perhaps be applied in a case of defiant wrong or of fraud. The time of the conversion is that which fixes the value to be recovered.⁶

A statute allows the owner of property which has been illegally distrained or attached to recover damages for the wrongful seizure, wrongful sale, and the costs incurred by defendant, without showing malice.⁷ In this form of action the plaintiff can recover only for damages done to his property, or for sacrificing it in the judicial sale, not for loss of business or of credit.⁸

The liability of the owners of dogs for "worrying cattle" or sheep, was passed upon by the Court of Appeals in 1876, without regard to the statute referred to in the next section; it was held that the owner was not liable for the doings of a "domestic and quiet animal, as a dog or a horse," unless "mischievous habits" could be shown;⁹ and we believe that the

⁴Strubbee v. Trustees Cincinnati S. R. R., 78 Ky. 481.

⁵Black v. Linville, 5 Dana, 177; Swigert v. Thomas, 7 Dana, 228; First National Bank v. Boyce, 78 Ky. 42 (see *supra*, Sec. 121, n. 6.)

⁶First National Bank, v. Boyce,

ubi supra.

⁷Gen. Stat., Ch. 1, Sec. 8.

⁸But where the suit sounds in malicious prosecution, more liberal damages may be awarded. (Fullenweider v. McWilliams, 7 Bush, 389.)

⁹Murray v. Young, 12 Bush, 387.

statute making the owner of a dog liable at all events does not reach injuries to cattle and sheep, but those to the person only.

SEC. 175. INJURIES TO PERSON AND CHARACTER. The right to sue for injuries to person and character has been enlarged by statutory provisions, aside of those dealing with injuries resulting in death. We give the more important provisions:

1. As elsewhere in the United States, a charge of incest, fornication, or adultery against a female is made actionable without showing special damage.¹

2. An action for seduction (that is, by the father) may be brought without showing loss of service.² If so brought the bar of time would run from the act of seduction; but the father may sue at common law, laying the accouchement as the gist of the action.³

3. He who owns, has, or keeps a dog is liable to the party injured for all damages done by such dog, unless the person injured be "on the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime."⁴

All causes of action for injury to the person survive upon the death of the plaintiff or defendant, except those "for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution" as refers to the personal injury.⁵ An action for maliciously causing the plaintiff to be arrested by the military authorities during the late civil war was deemed not to be within any of the excepted classes.⁶

Taking up the different kinds of action under this head, we begin with

¹ Gen. Stat., Ch. 1, Sec. 1. Though the statute is plain enough, the Court of Appeals had to pass on the needlessness of alleging special damage several times.

² *Ibid.*, Section 2.

³ *Wilhoit v. Hancock*, 5 Bush, 567; *Pence v. Dozier*, 7 Bush, 133. In the latter case a promise of marriage was allowed to be proved in aggravation of damages.

⁴ Gen. Stat., Ch. 9, Sec. 10.

⁵ *Ibid.*, Ch. 10, Sec. 1. And these causes of action do not pass to an assignee for the benefit of creditors. (*Francis v. Burnett*, 84 Ky. 24.)

⁶ *Huggins v. Toler*, 1 Bush, 192. The distinction seems over nice, but is perhaps justified by the enumeration of suits for "libel, slander, malicious prosecution, arrest, conspiracy," in the Statute of Limitations. Libel seems to be included in slander.

Seduction. A woman can not herself recover damages from her seducer,⁷ and a note given to stifle such an action is void for want of consideration.⁸

Slander. The earliest Kentucky doctrine seemed to be that only a charge of felony, not one of misdemeanor, is actionable; at least, not a charge of "trespass," and such the court called resistance to the excise officers.⁹ In a late case, where the words spoken charged the plaintiff with poisoning a mare, they were held actionable, though imputing a misdemeanor only; *first*, because the offense is infamous; *second*, because it is punishable by imprisonment.¹⁰

Where words derogatory to a young woman, but not actionable either at common law or under the statute, induced her affianced suitor to break his marriage engagement, it was deemed such special damage as would sustain her action.¹¹

The old rule, that an unproved plea of justification is conclusive of malice, and may be read to the jury in aggravation of damages, was disapproved, and said to be no longer in force in 1874.¹²

A plea of justification need not, like an indictment setting forth the same facts, be proved beyond a reasonable doubt.¹³

Libel. Written or printed words that are apt to throw contempt or ridicule upon the plaintiff, are actionable in Kentucky as elsewhere,¹⁴ yet in an action by a judge for libel, it

⁷ Woodward v. Anderson, 9 Bush, 624.

⁸ Cline & Co. v. Templeton, 78 Ky. 550.

⁹ Wallace v. Grant, Pr. Dec. 68, and the much later case of Russell v. Wilson, 7 B. Mon. 261, where words which imputed assistance in an attempt to rob were held not actionable. In Wimberly v. Metcalf, 10 Ky. Law Rep. 853 (Sup'r'r Ct.), the words spoken were "He has two wives, one here and one in Missouri or Arkansas." The court first held that it did not know judicially whether bigamy was a felony by the law of these States (though made such by an English

statute before 1607), but on rehearing sustained the action, because the words did not indicate that the second marriage had taken place outside of Kentucky.

¹⁰ Lemons v. Wells, 78 Ky. 117.

¹¹ Hardin v. Harshfield, 11 Ky. Law Rep. 638, rightly disregarding the Leading Case of Vickers v. Wilcox.

¹² Harper v. Harper, 10 Bush, 447.

¹³ Sloan v. Gilbert, 12 Bush, 51.

¹⁴ Shelton v. Nance, 7 B. M. 128, on an entry in a church book that plaintiff had "raised a report" and then "disproved" it, imputing to him at worst the sin of malicious lying and slander.

was said: "To charge a judge with improprieties, which would not be cause of impeachment or address, would be no more actionable than would the same charge made against a private citizen,"¹⁵ which is clearly right; but would not such words, when in print, be actionable in either case?

In an investigation before the committee of a lodge, one not a member of the lodge or order, gave his affidavit to the effect that a witness who had been examined by the committee was not worthy of credit under oath. This was held not to be a privileged communication.¹⁶

In other rulings on slander and libel we can not discover any divergence from the standard works, Starkie and Greenleaf being constantly quoted.¹⁷

Malicious Prosecution. Where the prosecution complained of is an attachment or injunction, the discharging or dissolving order must be "final" before an action for damages can be sustained.¹⁸ Where a judgment sustaining attachments was reversed in the Court of Appeals, but the mandate of reversal not yet entered in the court below, a suit for the malicious prosecution of the attachments was deemed too early.¹⁹

The Kentucky courts have steadily maintained the rule, that malice and want of probable cause are not synonymous; that the existence of one does not prove the other, though malice may be implied from want of probable cause:²⁰ that both must concur.²¹

An attorney who obtains from two justices an unlawful order, which implies either recklessness and gross ignorance, or malice (such as an order to attach a dwelling house for debt

¹⁵ Robbins v. Treadway, 2 J. J. Mar. 540.

¹⁶ Nix v. Caldwell, 81 Ky. 298.

¹⁷ The case of Letton v. Young, 2 Metc. 558, is often quoted. It turns upon the caution which the court ought to give to the jury where a repetition of the slander or libel is proved; the jury must be told that they can only consider it as proof of malice, and even after such a caution

an instruction, that they may consider *all the facts* in fixing the damages, is erroneous.

¹⁸ Wood v. Laycock, 8 Metc. 194.

¹⁹ Spring v. Besore, 12 B. M. 551.

²⁰ Yocum v. Polly, 1 B. M. 858.

²¹ Mitchell v. Mattingly, 1 Metc. 287, and cases quoted on p. 240. A verdict of acquittal does not prove either. (Ullman v. Abrams, 9 Bush, 786.)

by seizing it and locking out the owner), is liable to an action when the unlawful order is discharged.²²

On *Assault and Battery* and on *False Imprisonment* the Kentucky authorities offer nothing special, unless it be a case under the latter head, already treated under the head of "Liability of Judicial Officers."²³

NOTE TO SECTIONS 173, 174, 175.—An act of 1839 (Loughb. Stat., p. 572), allows several damages to be awarded by the jury against the several defendants in *trespass*, and the plaintiff to recover and collect all of them. Notwithstanding the Codes of Practice of 1854 and 1876, and the Revisions of 1852 and 1878, this law was held to be in force in 1888 (Alexander v. Humber, 86 Ky. 565), and was extended to a case where the liability of one of the defendants did not rest on any trespass, but on negligence only. (Central Passenger R'y Co. v. Kuhn, *Ibid.*, p. 580.)

SEC. 176. NEGLIGENCE AT COMMON LAW. The statute directing what actions shall survive, quoted *supra*, in Section 174, does not except an action for injury to the person, caused by the defendant's neglect, from survival. Where the negligent act, however, is a trespass (*e. g.*, where the defendant accidentally fired off his gun and wounded plaintiff's testator), the action sounds in "assault" and abates.¹

Where the neglect is such that an action on the *Case* and not of *Trespass* lies, and some appreciable time has elapsed in which the injured party suffered before dying, the action to recover for these sufferings survives. The court, when it first decided so, dispelled the fear that two actions might be brought, one for these sufferings, the other under the statutes compensating the representative for the injured party's death, by adding: "A recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or its consequences, and if a party elects to sue and enforce the right of action that survives, he will not be allowed

²² Wood v. Weir, 5 B. M. 544. On the vexed question how far the instigator of a malicious prosecution is excused by the advice of his attorney, the writer has not found any Ken-

tucky authority.

²³ *Supra*, Sec. 50, subsec. 8.

¹ Anderson v. Arnould's ex'r, 79 Ky. 370. But such shooting might be Willful Neglect; see next section.

afterward to avail himself of the punitive statute.”² But where death followed the injury almost instantaneously no cause of action survives.³

The distinction between slight, ordinary, and extraordinary care, and between the corresponding degrees of gross, ordinary, and slight negligence, as drawn by Lord Holt in *Coggs v. Bernard* from the Roman law, has been recognized by the Kentucky courts without those misgivings as to their practical value, in which Wallace and Hare in their learned notes on that case indulge, and in which they are backed by modern English decisions. The confusion and difficulty arising from these three degrees has been much increased by the “willful neglect” added by our statute.

It is admitted that the carrier of passengers owes to them more than ordinary diligence. But a distinction seems to lie between those carrying passengers by horse power and those who use steam power for the same purpose. In a suit brought against a carrier of the former class, an instruction that he was bound, “as far as human foresight and care would enable it, to carry the plaintiff with safety” was held erroneous, and the rule was announced instead, that he “must use the utmost care which prudent men are accustomed to use under like circumstances,” which means very little. But, in a suit arising out of an accident on a steam railroad, the court required “the highest degree of care and skill then practicable and then known;” and in a very late case it was said that “railway passenger carriers bind themselves to exercise the utmost degree of human care, diligence, and skill, in order to carry their passengers safely.”⁴

² *Horsford's adm'r v. Payne*, 11 Bush, 380. See, however, *Donohue v. Drexler*, 82 Ky. 157, to be quoted *infra* under “Satisfaction and Release,” as to the independence of the causes of action.

³ *Ibid.*, and *Murphy v. Louisville & P. C. Co.*, 9 Bush, 522, 524. Three days suffering before death were held sufficient by the Superior Court in *L. & N. R. R. Co. v. Wright's adm'r*, 11 Ky. Law Rep. 719.

⁴ *Louisville City Railw'y v. Weams*, 80 Ky. 420; see on the other side, *L. & N. R. R. Co. v. Fox*, 11 Bush, 495, 507; perhaps on the ground that the use of steam power imposes a higher degree of care; and *Same v. Ritter's adm'r*, 85 Ky. 368, where the words “utmost care, diligence, and skill” are, on p. 371, also used as indicating the duty of carriers of passengers generally.

A definition of ordinary care as "that degree of care which an ordinarily careful and prudent man usually exercises under like circumstances of himself, his family, etc.," was held misleading and erroneous, the court saying, "It is going quite too far to require that degree of care which any of such persons would take of *his family* placed in like circumstances."⁵

And where the trial court defined gross negligence as conduct "which indicates intentional wrong to others, or such a reckless disregard of their security or rights as to imply bad faith," it was also deemed error; for "gross negligence is not equivalent to fraud and malice, while it may furnish evidence of fraud, or tend to show malice." The definition thus rejected was said to accord with the Roman, not with the common law, and the task of defining gross negligence was given up as hopeless.⁶ In one of the earlier cases the word "gross" was said to have a well-defined meaning, but we are not told what it is.⁷

The courts of Kentucky have struck out their own line on the important question, how far an employer is liable to his employee for the negligence of a "fellow-servant;" and this line has since been trod by legislative bodies in other American States, and at last by the British Parliament.

In a case coming before the Court of Appeals in 1865, a common laborer, while carrying cross-ties and iron in the service of a railroad company, was required by the engineer to

⁵ L. & N. R. R. Co. v. McCoy, 81 Ky. 403, 409.

⁶ *Ibid.* 410, quoting Tudor v. Lewis, 3 Metc. 385, and overruling the passage in L. & N. R. R. Co. v. Robinson, 4 Bush, 509, from which the instruction thus defining gross negligence, and here disapproved, was copied.

⁷ Hansford's adm'r v. Payne & Co., 11 Bush, 380, 383; the cases here quoted only show that the statutory "willful" neglect is not the same as gross negligence. As the court must tell the jury what facts raise a liabil-

ity, its instruction as to the degree of negligence that entitles the plaintiff to a verdict is immaterial. (Empire Coal & M. Co. v. McIntosh, 82 Ky. 554.) The Kentucky courts have held that "gross" negligence on one side is not excused by contributory negligence on the other; see next note. But in Owen v. L. & N. R. R. Co., 87 Ky. 626, 630, this rule is denied as to gross neglect, and applied only to "willful neglect" under the statute for the protection of human life, discussed in the following section.

help him in righting up a locomotive; he did so; steam was up, the locomotive moved to and fro, and cut off both his legs. There was enough negligence in what the engineer did to entitle a stranger to a verdict. That the plaintiff was in its service, said Judge Robertson, should not exempt the corporation, "as it might perhaps do by the application of a recent rule adjudged in England, etc." He laid down the following principle: "It (the company) is responsible for the negligence or unskillfulness of its engineer, etc., and that responsibility is graduated by the class of persons injured by his neglect or want of skill—as to strangers, ordinary negligence is sufficient—as to subordinate employees *associated with the engineer* in conducting the cars, the negligence must be gross—but as to employees in a different department, etc., ordinary negligence may be sufficient. Among common laborers . . . all standing on the same platform of equality, and power, etc., no one of them *as between himself and his co-equals* is the corporation's agent, and therefore *it* is not responsible to one of them" for the fault of another.⁸

As to contributory negligence, one case should be noted. The messenger of an express company, being off duty on his return trip, rode, without the conductor's knowledge, in the express car. In an accident that car was thrown off the track, while the coaches, in one of which he should have been, were not. It was deemed contributory negligence, but would not have been such in an accident affecting the whole train alike.⁹ And the tender age of a child, even when a trespasser, may relieve it from the consequences of what otherwise would be contributory negligence.¹⁰ (A railroad was held liable to the father of a boy whom the conductor allowed to assist gratuit-

⁸ L. & N. R. R. Co. v. Collins, 2 Duv. 114; also Same v. Robinson, *ubi supra* (since overruled as to definition of gross negligence); see other cases of injuries resulting in death in next section.

⁹ Kentucky C. R. R. Co. v. Thomas' adm'r, 79 Ky. 160. The court in this case refused to hold railroad

companies to the duty of introducing *all* of the best appliances for safety. Contributory negligence must be pleaded. (L. & N. R. R. Co. v. Schuster, 10 Ky. Law Rep., p. 65.) It may be pleaded or denied in general terms. (L. & N. R. R. Co. v. Wolf, 80 Ky. 82.)

¹⁰ Kentucky Central R. R. Co. v. Gastineau's adm'r, 83 Ky. 119, 124.

ously as a brakeman in running the train, where he was hurt, for "loss of service," on the ground that a minor should not be employed without his father's consent in such a dangerous business.^{10a})

The disregard of a State law made for the safety of the public is in itself *culpa* or negligence; but though a city may be authorized to make similar by-laws, and to enforce them by fine or imprisonment, its ordinance can not stamp an act as negligent, nor, it seems, is the disregard of the ordinance even proof of negligence.¹¹

Where "horses or other stock" are killed or injured "along" a railroad, a statute puts the burden on the owner of the road to disprove negligence,¹² which has been successfully done, as the statute imposes no higher responsibility than the common law.¹³ But where the stock belongs to the owner or occupier of the land adjoining the track, and the railroad company has not provided him with a fence, it is, even when free of neglect, bound for half the loss.¹⁴

NOTE AS TO AMOUNT OF DAMAGES TO PERSON.—"Gross" neglect is a good ground for exemplary damages. (*L. & N. R. R. Co. v. McCoy*, 81 Ky. 403; *Same v. Mitchell*, 87 Ky. 327, 337.) Verdicts for the loss of one or both legs, of \$4,750 and \$5,000, were sustained as not too high in several cases. In *Mitchell's* case *supra*, \$10,000 awarded to a brakeman as "compensatory" damage, where his "life hung in the balance for weeks," and an ankle and foot being crushed were amputated, and he was "disabled from earning a living at his accustomed employment, if not altogether," was sustained. But in the absence of grounds for punitive damages, \$10,000 was thought too high for the breaking of an arm in two places. (*L. & N. R. R. Co. v. Sickings*, 5 Bush, 1.) Where \$35,500 was given to one seriously crippled by a railroad accident, and who suffered great pain for eight months, \$5,500 of the verdict going to costs of cure and loss of baggage, and no proof as to loss of earning capacity, the verdict was set aside as excessive. In *Mitchell's*

^{10a} *L. & N. R. R. Co. v. Willis*, 83 Ky. 57.

¹¹ *Dolfinger v. Fishback*, 12 Bush, 474; injury done by a runaway wagon, which the driver, in disregard of the city ordinance, had left standing unhitched on the street. Another ordinance, forbidding the use of shade trees for hitching, was invoked by

the defendants.

¹² Gen. Stat., Ch. 57, Sec. 5.

¹³ *Claxton v. Lex. & B. S. R. R. Co.* 13 Bush, 637; *Ky. C. R. R. v. Lebus*, 14 Bush, 518; *Same v. Talbott*, 78 Ky. 621.

¹⁴ Gen. Stat., Ch. 57, Sec. 2. Held constitutional in *L. & N. R. R. Co. v. Belcher*, 11 Ky. L. R. 393.

case *supra*, evidence to show that the injured man had a family to support was admitted. A father suing *per quod servitium* for an injury to the child who dies thereof can recover for loss of service during the child's life only, not, as under a New York authority, the value of the service till the child should come of age; nor for hurt to his feelings. (Covington S. R. W. Co. v. Parker, 9 Bush, 455.)

SEC. 177. INJURIES RESULTING IN DEATH. In 1846 the British Parliament, in passing Lord Campbell's Act, wrought a great change in the common law by directing "that whensoever the death of a person shall be caused by any wrongful act, neglect, or default, which if death had not ensued would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, etc., shall be liable to an action for damages, etc."¹

This act gave the example to the American States. But long before 1846 Kentucky had taken two steps in this direction. The law of survivorship, as stated in the two foregoing sections, was first enacted as early as 1812;² and in 1839, in its earnest effort to suppress dueling, the legislature passed an act which in its present form gives to "the widow and minor child of a person killed in a duel, or either of them, . . . an action against the surviving principal, the seconds, and all others aiding or promoting the duel," with power in the jury to award vindictive damages.³

But in 1853, when, by the negligence of those in charge of a railroad train, the plaintiff's wife was thrown out of her buggy at a railroad crossing and killed, her husband was held remediless in an action for the loss of *consortium*, and was not even allowed to recover for the time during which his wife lingered, or for the expenses of burial.⁴

This decision led to the enactment of the law of March 10, 1854, "for the redress of injuries arising from the neglect or misconduct of railroad companies and others," since embodied

¹ Stat. 9 & 10 Vic., Ch. 95, see Addison on Torts, Sec. 575.

² M. and B. Stat., p. 88, now Gen. Stat., Ch. 10. A statute which, as shown in the case next to be quoted, was overlooked as late as 1853.

³ Loughb. Stat., p. 572, now Gen. Stat., Ch. 82, Sec. 1; there can be but one action; those not included therein are discharged, *Ibid.*, Sec. 2.

⁴ Eden v. L. & F. R. R. Co., 14 B. M. 204.

in the General Statutes.⁵ Here the sections giving compensation for death caused by neglect read, when stripped of needless verbiage, as follows :

“ If the life of any person not in the employment of a railroad company shall be lost *in this Commonwealth* by reason of the negligence of the proprietors of any railroad, or by the unfitness or negligence of their servants or agents, the personal representative of the person whose life is so lost may recover damage in the same manner that the person himself might have done for any injury, where death did not ensue. (Sec. 1.)

“ If the life of *any* person is lost by the *willful* neglect of another person, company, or corporation, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person, company, or corporation, and recover *punitive* damages for the loss of the life.” (Sec. 3.)

In 1866 an act was passed, in the spirit and frame of the anti-dueling law of 1839, which directs “ that the widow and minor child or children of a person killed by the careless or *malicious* use of fire-arms, or other deadly weapons, not in self-defense, may have an action against the person who committed the killing for reparation of the injury, and may have vindictive damages.^{6a}

⁵ Stan. Rev. Stat., II, p. 510, Secs. 1 and 3, re-enacted in G. St., Ch. 57, Secs. 1 and 3, with only the change of “ in this Commonwealth ” for “ in this State. ” Though a petition of a personal representative allege willful neglect and fail to show that the decedent was not in the employment of the railroad, yet if he was not, and a lower degree of negligence be proved, there may be a recovery of compensatory damages. (L. & N. R. R. Co, v. Smith's ex'r, 10 Ky. Law Rep. 514.)

^{6a} Myers' Suppl., p. 681, now Gen. Stat., Ch. 1, Sec. 6. As the words “ not in self-defense ” are in the body of the act, they should be stated in pleading (Becker v. Crow, 7 Bush, 198). See *supra* to the contrary a

to the words “ not in the employment. ” B. and F. in their edition quote, under Ch. 32, Sec. 1, Williams v. Hedricks, Pr. Dec., 203, to the effect that Kentucky never recognized the doctrine by which the civil injury is merged in the felony. The old rule was expressly abrogated by the Rev. Stat., Ch. 28, Art. I, Sec. 4 (now Gen. Stat., Ch. 29, same article and section), but in the case quoted in the next note the Court of Appeals intimated that the old rule still forbade a recovery for homicide in any form. The suit by the personal representative can not be brought when the killing was intentional. (Spring's adm'r v. Glenn, 12 Bush, 172.)

Taking the two sections of the act of 1854 together, we see that in the case of railroad accidents there can be no recovery for the death of employees (and these are most frequently killed), unless the neglect is willful; but when it is willful the damages may be punitive. In an early case of willful neglect in the use of fire-arms, the objection that the "punitive" damages are another punishment beside that by indictment for the same offense, and therefore unconstitutional, was met by the court with the answer, that "punitive," or "vindictive," or "exemplary" damages are only meant for a fuller measure of compensation, "because the injury has been increased by the manner it was inflicted."⁶ But the giving of punitive damages is in the discretion of the jury.⁷

"Willful neglect," when established, shuts out the consideration of contributory negligence.⁸

"Willful neglect" is so far a fact that it may be found as such by a special verdict,⁹ and that a petition alleging willful neglect in so many words, without showing the circumstances through which death was caused, is good.¹⁰ The court has, however, repeatedly defined willful neglect. In one of the earlier cases, thus: "An intentional wrong, or such a reckless disregard of security and right as to imply bad faith."¹¹ In a later case the following is given as having been stated repeatedly before: "An intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury."¹²

These words are tested most frequently when the employee of a railroad is killed by a so-called accident; and the facts in such cases best illustrate the practical meaning of the words.

⁶ Chiles v. Drake, 2 Metc. 146.

⁷ L. & N. R. R. Co. v. Brooks' adm'x, 83 Ky. 129, 139; error to tell the jury they ought to find such damages.

⁸ L. & N. R. R. Co. v. Brice, 84 Ky. 298, 305.

⁹ Needham v. L. & N. R. R. Co., 85 Ky. 428.

¹⁰ Rogers' adm'r v. Hughes, 87 Ky. Law Rep. 185. Other degrees of negligence are not to be pleaded, the Kentucky rule agreeing with that followed elsewhere.

¹¹ L. & N. R. R. Co. v. Filbern's adm'x, 6 Bush, 574, 580.

¹² Kentucky Central R. R. Co. v. Gastineau's adm'r, 83 Ky. 119, 128.

In what may be considered the leading case,¹³ a collision between two trains, by which the engineer on one of them was killed, arose from two causes: the unskillfulness of the engineer on the other train, who lost several hours of time, and at last failed to get his train up a grade; secondly, from the failure of the train-dispatcher to notify the conductor of decedent's train of the delay in the other train, though he had himself been notified of it by the telegraph operators at two stations. The finding of willful neglect was approved.

In another case the collision, and with it the death of the engineer, arose from a dispatch sent by the train-dispatcher to the conductor of decedent's train, telling him that he "can have until ten, 10, o'clock" to make a station, when he meant ten o'clock, but which the conductor read as ten minutes past ten. The rules of the company allowed the repeating of the time in figures. The figures might have been put in brackets, the court said; but can brackets be telegraphed? The court thought that the rule itself, being apt to lead to mistakes, was an instance of willful neglect; and such was also the omission of the train-dispatcher to use "such signs or words as a person of ordinary prudence would have used."¹⁴

The failure of a section boss to have a decaying tree removed from the neighborhood of the track, by reason whereof it fell across it and caused a wreck in which an employee was killed, was not in itself willful neglect in the company, though the jury might have found it such under all the facts of the case.¹⁵

An attempt by the widow of a "feeble-minded" man, killed by strong drink, to recover damages from the liquor dealer who sold or gave him to drink, failed; the court hold-

¹³ Louisville, C. & L. R. R. Co. v. Cavens' adm'r, 9 Bu-h, 559.

¹⁴ McLeod, rec'r, v. Ginther's adm'r, 80 Ky. 399.

¹⁵ L. & N. R. R. Co. v. Filbern's adm'r, *ubi supra*; that the engineer who was killed was a higher employee than the section boss was deemed immaterial. Placing a num-

ber of platform cars in front of the locomotives, which cars were derailed and the decedent was killed by the locomotive running into and crushing the cars, was found to be willful neglect by the jury, and the verdict was sustained in L., C. & L. R. R. Co. v. Mahoney's adm'r, 7 Bush. 235.

ing that such action, even if culpable, could never come within the definition of willful neglect.¹⁶

There can be but one action for death by "willful neglect" brought by either widow, heir, or representative; the success or defeat of either of them bars the others.¹⁷ Until 1887 it was thought that a suit might be brought by the personal representative, whether there was a widow or child, or not; and it was not certain but that the recovery might become assets for creditors. It was then held by the Court of Appeals, *First*, that the recovery is never assets; that it belongs to the widow and child or children exclusively, and if there is no child, to the widow alone. *Second*, that the widow has the best right to sue, and when there is no child her suit will cause the abatement of even a suit preceding hers, brought by the administrator. It was intimated, but not yet decided, that where the person killed leaves neither wife nor child there can be no recovery, and doubted whether adult children can participate.¹⁸

The Superior Court soon afterward, in two opinions, delivered in May and September, 1888, took the next step, and held that "heir" in the statute means "child," and that when there is no wife or child no action lies.¹⁹ This doctrine was approved by the Court of Appeals in June, 1889,²⁰ mainly upon the strength of the construction given by the English courts to the act of 1846, known as "Lord Campbell's Act."²¹ The word "heir" is not to be construed as distributee; the father and mother of the deceased, though dependent upon him for their bread, can not recover, either with the widow, so

¹⁶ Rogers' adm'x v. Hughes, *ubi supra*.

¹⁷ L. & N. R. R. Co. v. Sanders, 86 Ky. 259. See L. C. *infra*, Sec. 185, as to limitation.

¹⁸ Henderson's adm'r v. Kentucky Central R. R. Co., 86 Ky. 289. The words "child" and "minor child" were imported from the act of 1866, on the wanton use of fire-arms, to give consistency to the General Statutes. The widow and children, it seems, would divide the recovery

like they would the personal estate of the decedent.

¹⁹ L. & N. R. R. Co. v. Coppage, 10 Ky. Law Rep. 193; Kentucky Central R. R. Co. v. Clark, *Ibid.* 321.

²⁰ Jordan's adm'r v. Cin'ti, N. O. & T. P. R. R. Co., 11 Ky. Law Rep. 204.

²¹ The court mistakenly puts the date of the oldest Kentucky act, that in favor of a widow or child losing a father or husband by a duel, after Lord Campbell's Act, while it antedates the latter by seven years.

as to cut her down to her distributive share, or alone; in short, when there is no widow or child the defendant goes scot free.

But this distinction does not apply to the first section of the act of 1854, now Section 1 of Chapter 57 of the General Statutes, by which the representative of a person killed by the carelessness of a railroad company, while not in its employ, may sue in like manner as the decedent. The sum recovered under this section is assets, and goes not only to the next of kin, but to creditors.²² The measure of recovery in such a case has not been discussed by the Court of Appeals, and it is hard to see how any more could be recovered by the executor or administrator than the decedent was entitled to at the moment of his death, and this might have been recovered without this act, by a close and faithful compliance with the act of 1812 on the survival of actions.

The measure of damages for a death caused by "willful neglect" has been passed upon several times. The "punitive" damages spoken of in the statute seem to be nothing but an ample allowance or "reparation" to the widow and children for the loss of their natural supporter. The Court of Appeals, notwithstanding the word "punitive," which is in our statute but is not in Lord Campbell's Act, approves and seems willing to apply a decision made under the latter,²³ holding that the damages are to be assessed as a "compensation for the pecuniary and actual injury sustained, not as a *solatium* for mental anguish of, or loss of companionship by, the survivors, nor for the sufferings of the deceased."²⁴ The state of the family, and the number and age of the children of the deceased, his earning capacity, and his expectation of life according to the Life Tables may be proved to show how much his family have, in a pecuniary sense, lost by his death.²⁵

²² *Givens v. Kentucky Cent. R. R. Co.*, 11 Ky. Law Rep. 452.

²³ *Blake v. Midland R'y Co.*, 18 Q. B. 93.

²⁴ This view follows from *Chiles v. Drake*, *supra*.

²⁵ *McLeod v. Ginther*, *ubi supra* (where a verdict of \$7,500 for the death of a railroad engineer was deemed not to be excessive); *L. C. & L. R. R. Co. v. Mahoney's adm'x*, 7 Bush, 235.

CHAPTER XXIX.

INCIDENTS AND DEFENSES.

SEC. 178. Interest.

SEC. 179. Usury.

SEC. 180. The Gaming Laws.

SEC. 181. Other Unlawful Contracts.

SEC. 182. Satisfaction and Release.

SEC. 183. Release of Sureties.

(With Note on Alterations in Writings.)

SEC. 184. Costs and Damages.

SECTION 178. INTEREST. The rate of interest allowed by the laws of Kentucky, in the absence of a special contract, is six per cent per annum, and this is also the highest rate that can be lawfully exacted.¹ "Partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due."² This clause of the statute is understood as adopting the rule known as the "rule of the Supreme Court" as to the calculation of interest when there are partial payments; that is, a rest is made at the date of any partial payment, unless it be less in amount than the interest which has accrued from the next preceding payment.³ All judgments (which include decrees in chancery), unless rendered for principal and accruing interest, bear six per centum interest from the date of rendition.⁴ This rate of six per cent is presumed to prevail in other States as to contracts made, or judgments rendered therein, until the contrary is shown.⁵

¹ Gen. Stat., Ch. 60, as drawn originally, allowed a higher rate to be fixed by contract, but the parts of the chapter having that effect are repealed by act of March 2, 1878, put in the place of Secs. 1 and 2, in B. and F.'s edition.

² Chapter 60, Section 5.

³ *Riddle v. Lewis*, 7 Bush, 193, relying on *Taylor v. Knox's ex'rs*, 5

Dana, 466, where the exception is recognized by the remark that interest must not be compounded.

⁴ Gen. Stat., Ch. 60, Sec. 6. The exception of judgments for personal injury is repealed by act of March 1, 1888. (B. and F. Gen. Stat., App'x, p. 87.)

⁵ Chapter 60, Section 7.

Under the law as understood at present all debts, when liquidated and payable at an agreed time, bear interest from that time; and when payable on demand, from the time of such demand.⁶ In suits for trover and conversion, or for trespass to property, the jury may, as elsewhere, *in its discretion*, include an estimate for interest in the damages which it awards.⁷

Upon a merchant's account, where the credit is indefinite, interest can not be charged until there has been a demand; a verdict allowing interest from an earlier day must be set aside.⁸

We have seen how the statute demands from those coming to redeem lands sold upon execution, or under the judgment of a court, interest at the rate of ten per cent per annum; and that the lien acquired by a purchase of encumbered property on execution bears the same rate.⁹

SEC. 179. USURY. To stipulate for or receive interest at a higher rate than six per cent a year, for the loan or forbearance of money, is usury; a contract to pay more can not be enforced, and when usury is paid it may be recovered back; but there is no other forfeiture.¹ The chartered banks always charge discount in advance, and have been sustained therein;² and the old custom, now nearly gone out, to hide usurious rates under the disguise of buying bills drawn on other cities has been recognized as lawful, both by decision and by a statute regulating it.³

The Kentucky courts are in accord with other courts as to the devices for evading the usury laws. A clause in a promissory note, that the maker will pay a fee to the plaintiff's lawyer should his default make it necessary to sue, is not usury; but it is a penalty which can not be enforced if the defendant,

⁶ As to rent see *supra*, Sec. 90, note 7; as to computation of interest against guardians, *supra*, Sec. 146, note 18.

⁷ *Newcomb-Buchanan Co. v. Basket*, 14 Bush, 658, 667.

⁸ *Leisman v. Otto*, 1 Bush, 225.

⁹ See *supra*, Secs. 68 and 69.

¹ Gen. Stat., Ch. 60, Secs. 2, 3, 4, and act of 1878 (inserted in B. and F. Gen. Stat. 797).

² *Newell v. Nat'l Bank of Somerset*, 12 Bush, 57.

³ *Pilcher v. The Banks*, 7 B. M. 548; Gen. Statutes, Ch. 60, Secs. 8 and 9.

when sued, objects.⁴ A surety who has himself paid usury to the creditor for forbearance can not recover the excess paid from the debtor, and the latter's note to him is, as to such excess, not enforceable.⁵

Usurious loans are often continued so long that the right to recover excess of interest actually paid is lost by limitation long before the lawful debt is paid off. The position is then naturally taken by the debtor that the excess of interest paid above the lawful rate should be credited on the principal; and thus the question of limitation could not arise until the debt was actually paid off; and any renewal note would be void for want of consideration so far as it represents a part of the old debt extinguished by such credits. In the older cases, when under the harsher usury law of the time the new security would have been void altogether, this doctrine was disallowed; the usury was to be applied in reduction of the principal only, if the defense of usury was set up by the debtor during the life of the original security, and if that was canceled, upon a renewal the new note would stand good, subject only to an offset for a claim for usury, which claim is liable to be barred by limitation.⁶

In 1875, however, it was said: "The more modern rule is, that as long as the debt exists upon which usury has been paid, although the evidences have been repeatedly renewed, usury paid at any time may be reclaimed as long as any part of the debt remains unpaid." But because in the case before the court the new note had been signed by only a *part* of the obligors bound in the old note, the court thought that there was a "complete novation," and the modern rule did not apply.⁷

This decision again was overstepped in 1880, when it was

⁴ Thomasson v. Townsend, 10 Bush, 114; Gaar v. Louisville Banking Co., 11 Bush, 180; hence under the later "ten per cent law" this additional undertaking did not forfeit the other interest. In a MS. Op., quoted in the former, a judgment by default for such a fee was sustained; the

objection to the penalty must be made in pleading in the court below.

⁵ Morton v. Legrand, 2 Litt. 326.

⁶ Crutcher v. Trabue, 5 Dana, 80, 83, and other cases quoted in next case.

⁷ Smith v. Young, 11 Bush, 393, 399.

said broadly: "To the extent that usury is embraced in the debt, and *so long as it can be traced* the new obligation given in discharge of the old indebtedness is without consideration."⁸ And this was followed up in 1881 with the declaration: "The mere change of the payee, or of a *part of the obligors*, is not a payment of the usury. And if the usury on the old debt be carried into the new contract so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor, the usury should be extracted;"⁹ and the same ruling was again given in 1889, upon substantially the same facts, that is, the change of payee and of part of the obligors, and where a debt had run for thirty years.¹⁰

By the old doctrine the defense of usury is a personal right of the borrower, and his right to recover it back when paid can not be garnisheed by his creditors without his consent, though it might have been reached by the creditor if the borrower had once made the claim, or it might have been specifically assigned by him.¹¹ To this extent the old doctrine of the "personal right" would still hold good. In the settlement of decedent's estates, of estates wound up under the anti-preference law, and of general assignments, the statute requires from each claimant an oath that no usury is embraced in his claim;¹² hence the court is bound to disallow the usury in any claim at the instance of any party in interest. And as the usurious

⁸ Rudd v. Planters Bank of Ky., 78 Ky. 513, 515. Perhaps some of the many renewals running over three years were with new sureties; but the opinion does not allude to the point.

⁹ Fitzpatrick v. Apperson's ex'r, 79 Ky. 272, 276, overruling Smith v. Young out and out, though professing not to do so. Followed and approved in Magill v. Mercantile Trust Co., 81 Ky. 129. The usury (a commission paid by the borrower to the lender's agent) was in a note and mortgage which had been lifted by a new mortgage for a larger loan and upon a greater estate in the land.

¹⁰ Kendall v. Crouch, 10 Ky. Law Rep. 993.

¹¹ Estill v. Rodes, 1 B. M. 314. The words "choses in action" in the statute authorizing garnishment in a creditor's suit are not equivalent to "causes of action." The word "choses in action" is also used in Sec. 439 of the present Code of Practice, which authorizes proceedings to enforce a judgment. In Breckinridge v. Churchill, 3 J. J. Mar. 11, it was held, that a reclamation of usury does not pass under a general assignment of all the grantor's property.

¹² See *supra*, Secs. 129, 130, 131.

nature of a debt still unpaid need not be pleaded,¹³ it would follow that whenever several parties have a claim upon the same fund the Chancellor must purge the demand of each party of usury for the benefit of the others, and it has been so held in a late case.¹⁴

Under the statute "a court of equity may grant relief for excess of interest, and to that end may compel a discovery, etc.; such excess may be recovered from the lender or forbearer, although the payment was made to his assignee."¹⁵ The Code of Practice (Sec. 17) forbids the enjoining of a judgment for any cause that does not arise or is not discovered after its rendition, but does not forbid the recovery by the defendant "of any claim which was not, though it might have been, used as a set-off or counter-claim." Where a debtor has paid no part of a demand, he certainly can have no "claim" for usury paid, but only a defense in the narrower sense. He can not enjoin the judgment; he is bound to pay it;¹⁶ and it would seem that such payment must be final. Yet it has been held, that where a judgment at law or decree in equity is rendered for a money demand, and the defense of usury has not been raised in the action, the defendant may, within the period of limitation counted from such payment, sue for the excess paid by him over principal and lawful interest.¹⁷

SEC. 180. THE GAMING LAWS. The present statutes on gaming are, so far as they give or take away civil remedies, mainly based on an act of February 2, 1833,¹ and are embodied in Chapter 47 of the General Statutes.² The sections dealing with civil rights and remedies read substantially as follows:

¹³ Lucking's adm'r v. Gregg, 12 Bush, 298.

¹⁴ Hart v. Hayden, 79 Ky. 346; "Mrs. G. may not have pleaded usury, or may be willing to a judgment selling the land for appellee's debt, still she can not by her silence or refusal to plead, permit property on which appellant's lien exists to be sold for a debt based on a vicious consideration."

¹⁵ Gen. Stat., Ch. 60, Secs. 3 and 4.

¹⁶ Chinn v. Mitchell, 2 Metc. 92; the section of the Code was applied to usury.

¹⁷ Ross v. Ross, 3 Metc. 274; Sherley v. Trabue, 85 Ky. 71.

¹ M. and B. Stat., I, 758, passed, it seems, to remedy the shocking state of the law revealed in Greathouse v. Throckmorton, 7 J. J. Mar. 16.

² The amendatory law of 1886 is penal only.

“1. Every contract, conveyance or transfer for the consideration, in whole or in part, of money or other thing won, lost or bet at any game or wager, or lent for the purpose of gaming, or lent at the time of gaming or wagering to a person then engaged [therein], shall be void.”

Where one who owes a gaming debt requests a third party to pay money, or furnish goods on account of it to the winner, such third party, though aware of the consideration for the request, may recover thereon the money paid or the price of goods furnished.³ Even where the seller of goods looks to the loser of the bet for his pay, according to its terms, he can recover the price from the loser.⁴ Where a chattel is lost and delivered to the winner, and bought back by the loser, a note for the price, whether to the winner or to some third person in the interest of the winner, can not be enforced.⁵

“2. If any person shall lose to another at one time, or within any twenty-four hours, five dollars or more, or property of that value, and shall pay, transfer, or deliver the same, such loser, or any creditor of his may recover the same, or the value, from the winner or [his] transferee, having notice, by suit brought within five years; and if the transfer were of real estate, the heirs of the loser may recover it back by suit brought within two years,” unless it have passed to a *bona fide* purchaser for value.

The heavy penalties which are denounced in other sections of the act against “common” or professional gamblers, and

³ English v. Young, 10 B. M. 141.

⁴ Hieronymus v. Harris, 14 B. M. 313 (1854). As the seller aids in the illegal transaction, and as moreover the court must in trying the case determine the result of the bet, which is no part of a court's duty, the writer has always doubted the correctness of this decision. The bet was on a presidential election; suppose it had been on that of 1876, must the court in order to decide the bet have overhauled the contest between Hayes and Tilden? Such a

suit would hardly be sustained in our time.

⁵ Brittain v. Duling, 15 B. M. 138, arising before the present statute; the case falls clearly within its words. A note given *in part* for money lent to gamble with is void, though the game went on in another State. (Collins v. Morrell, 2 Metc. 163.) A note given for money lost at play is void, though given to a third party and accompanied by a writing to the effect that the maker has no legal offset. (Pace v. Martin, 2 Duv. 522.)

especially against those who set up a faro bank or other "contrivance" for gaming, are held to indicate that one who "keeps the bank" can never under this law recover the money lost by him while "banking."⁶ As the criminal laws against lotteries only punish those who set up a lottery, not those who buy tickets,⁷ it would follow in like manner that the former can never recover a prize paid back from the winner.

We have seen that a wife in pursuit of alimony is a creditor within the meaning of this law.⁸ When the loser himself brings suit, and such suit is in good faith settled between him and the winner, his creditors can not sue thereafter.⁹ But whenever five dollars or more are lost at any sitting, the loser's creditors have a vested right to sue the winner, who can not in the action by the creditor set off the winnings of the loser at some other sitting.¹⁰

"4. If such loser or his creditor do not sue for the money or thing lost within six months after its payment or delivery, and prosecute the suit, etc., any other person may sue the winner and recover treble the amount, etc., within five years."¹¹

If the winner, before such a suit is brought by a stranger, repays the amount won in good faith to the loser or his creditor, the "popular action" can not be brought thereafter.¹² The suit under this clause of the statute can not be brought by the wife of the loser.¹³

"5. The stakeholder of any thing that may be staked on any bet shall, when thereto notified, return it to the person making the stake, etc."¹⁴

Though the demand for the return of the stake be based on other grounds than the unlawfulness of the bet, the stakeholder can not refuse to comply with it.¹⁵ (The landlord of a poker-room, paid for room rent and use of cards by a toll on

⁶ Brown v. Thompson, 14 Bush, 538.

⁷ Gen. Stat., Ch. 29, Art. XXIII.

⁸ See *supra*, Sec. 144, n. 6.

⁹ Caldwell v. Caldwell, 2 Bush, 446.

¹⁰ *Ibid.*, p. 451.

¹¹ The Rev. Statutes gave half of the treble recovery to the Commonwealth; not so the present law.

¹² Barnes v. Turner, 4 Metc.

¹³ Moore v. Settle, 82 Ky. 187.

¹⁴ Enforced in Conner v. Ragland, 15 B. M. 634; the bet was on an election.

¹⁵ Hutchings v. Stilwell, 18 B. M. 776.

the stakes, graded by the dignity of the winning hand, is a partner with all the winners, and as such liable to a player for his losses under Section 2 or 4.)^{15a}

A section of the chapter on Crimes and Punishment gives to "citizen artist painters" residing in the State the privilege alone, of all men, to dispose by lot of pictures, "the entire creation of their pencil and individual art, or which may have been finished by them."¹⁶ But this seems to be repealed by a general law of 1878, which repeals all acts or parts of acts that confer a lottery privilege or franchise.¹⁷ Finding that this repealing act was disregarded by those claiming special franchises, the legislature in the spring of 1890 passed a number of separate acts, repealing by name every franchise that might still have some shadow of existence.¹⁸

There is, however, a game conducted on a grander scale than all other "games, sports, pastimes, and wagers," to which the gaming laws have lately been extended, namely, the fictitious trade in produce or stocks, carried on without any thought of delivery or receipt of the things dealt in, and which is nothing else than a bet on the future state of the market. The first case of this sort which came before the Court of Appeals was a suit by a firm of brokers against their constituents for the balance of an account of purchases and sales, with charges for commission and credits for the "margins" put up. The court did not decide whether there was an unlawful speculation within the meaning of the gaming laws, but, upon the evidence given by the plaintiffs, held that they had made neither purchases nor sales for the defendants; they had really, always in their own name, bought and sold for themselves, the defendants, and other customers, only the excess of buying needs and orders over selling needs and orders, or *vice versa*, setting off the former against the latter, so that no particular lot of

^{15a} Triplett v. Seelbach, 11 Ky. Law Rep'r, 278 (Superior Court), now on appeal before the Court of Appeals.

¹⁶ Gen. Stat., Ch. 29, Art. XXIII, Sec. 2.

¹⁷ B. and F. Gen Stat., p. 912.

¹⁸ Repeal of Henry College grant,

Sess. Acts, p. 40; Shelby College grant, *Ibid.*, p. 41; old Frankfort grant, *Ibid.*, p. 42; new Frankfort grant, p. 43; franchise in charter of Grand Lodge, *Ibid.*, p. 45; Paducah Wooden Ware grant, *Ibid.*, p. 129.

goods ever belonged to the defendants; and though it was shown that "in Chicago" the broker's book entries in the course of such dealings are called purchases and sales, the court said they were not such in law, and threw the claim out.¹⁹

Contracts for future delivery are not void in themselves.²⁰ But where both parties understand such a contract as simply a bet on the future state of the market, as is always the case at the "bucket shop," the business is gambling; the shop itself is an unlawful contrivance, and a telegraph company is not bound to aid such a business by furnishing the shop with market reports.²¹

Where contracts are made through regular brokers who do a good deal of real business, the question between gambling and real, binding contracts is hard to determine. Where the broker makes real contracts for his customer with third parties, buying and selling goods for them actually, or even making contracts for future delivery and selling these contracts out before maturity, without any agreement or understanding that goods shall never be accepted and paid for, the court can not declare the sales and purchases void, though it appear that in a long course of dealings the customer has never been put into actual possession of any one lot of goods, and though only executory contracts were bought and sold and no specific lots of commodities.²²

Though the contracts for future delivery be in writing, parol proof is admissible to show their real character as mere bets. While in the case last quoted a tacit understanding, implied from the circumstances, that there should be no actual

¹⁹ Butcher's Sons v. Krauth, Ferguson & Co., 14 Bush, 713.

²⁰ Sawyer, Wallace & Co. v. Taggart, 14 Bush, 727, 735.

²¹ Smith v. Western Union T. Co., 84 Ky. 664. We have quoted elsewhere a case of the same name, reported in 83 Ky. 104: a suit against a telegraph company for neglect in failing to deliver a message as to stock speculation (see *supra*, Sec. 172. n. 6). Though the plaintiff could not

recover his loss by reason of remoteness, the court seemed to look upon his speculation as a legitimate business to be protected by the law.

²² Sawyer, Wallace & Co. v. Taggart, *ubi supra*. The distinction in the form of the dealings and the case quoted in note 19 and decided at the same time is plain enough; the distinction in the practical and moral aspect of the dealings is very slight, if there is any.

deliveries, was held insufficient to stamp a series of deals as gambling: such an understanding was inferred in 1887 where the brokers, being worth about \$75,000, "bought," in the course of one year, cotton to the extent of nearly three hundred thousand bales, of which only four thousand bales were delivered; and the customers, a firm of country merchants in a Kentucky village, were bound to take 60,000 bales, that is, nearly three million dollars' worth of cotton. A special verdict on this proof, that no actual delivery was ever contemplated, was sustained.²³

With regard to losses in the "bucket shop" the Court of Appeals has gone so far as to treat them like losses in an ordinary game at cards, which the loser may recover back from the keeper of the shop as winner, under Section 2; for, though the deal may be pending for a long time; it is closed out in an instant, and thus a greater sum than five dollars is lost within twenty-four hours.²⁴

NOTE.—Without otherwise noticing the criminal sections of the chapter on Gaming, we may yet refer to Article II, Section 1, on Election Bets, by which section, aside of a prosecution by indictment, the winner is liable to have the sum of money or thing won, after delivery to him, forfeited to the Commonwealth, to be recovered from him in an appropriate action. This double punishment was held constitutional notwithstanding the fourteenth section of the Bill of Rights. The pleadings in the action need not say any thing about the indictment, either way. (*Commonwealth v. Avery*, 14 Bush, 625.)

SEC. 181. OTHER UNLAWFUL CONTRACTS. The Kentucky courts have followed the general trend of English and American law in deciding what contracts are invalid as arising from a vicious consideration, aside of the causes already treated of, usury and gaming. And here as elsewhere a security given even in part for a vicious consideration is void altogether.¹ There are, however, some divergences:

I. *Use of Influence.* It was always held that it is unlawful to stipulate for a contingent fee to get a bill passed, obtain a

²³ *Beadle v. McElrath*, 85 Ky. 230.

²⁴ *Lyon v. Hodgen*, 10 Ky. L. R. 271. A local statute forbidding under heavy penalties gambling in futures

at *Lexington* does not repeal the general law on the subject as found in the General Statutes.

¹ *Averbeck v. Hall* 14 Bush, 505.

pardon, or otherwise to obtain favorable action from the powers that be. And the rule was at first applied to the use of influence with commanding officers in power during the late civil war, even where such officer was acting wrongfully and perhaps corruptly.² But in two later cases the court made the dangerous distinction that where the commander was wielding usurped power, or where he was called upon to set aside the sentence of an unauthorized military court, it was lawful to use influence with him to set him right, and a contract to pay for such influence was binding.³

II. *Stifling a Prosecution.* An agreement by A. to pay B. a sum of money for this, among other considerations, that B. would "use every legal and proper endeavor to have dismissed" certain *penal* or criminal prosecutions against C., was held void, but it does not appear from the printed report whether the prosecutions involved a charge of felony.⁴ It had been held in an earlier case, which has not been overruled, that the compounding of a felony only is a vicious consideration, not the compounding of a misdemeanor, such as the embezzlement of money by the teller of an unincorporated bank was at that time.⁵

III. *Public Officers.* It is improper for the officer of a city to furnish from its records, for a reward to be paid to himself other than his lawful fees, information upon which a suit is to be brought against the city. The promise to pay such reward is void.⁶

A contract with a jailer, by which he gave his whole time and attention to the nursing of a prisoner who was sick at the

² *Hutchen v. Gibson*, 1 Bush, 270. The defendant was entitled under the President's proclamation to take the amnesty oath, which the commander refused to let him take until plaintiff, being hired to do so, interposed his offices.

³ *Rau & Rieke v. Boyle*, 5 Bush, 253; *Thompson v. Wharton*, 7 Bush, 566. We omit cases on Confederate money and on other matters growing out of the civil war.

⁴ *Averbeck v. Hall*, *ubi supra*.

⁵ *Barclay v. Breckinridge*, 4 Metc. 374 (the act would now be felony under Gen. Statutes, Ch. 29, Art. XII, Sec. 2).

⁶ *Lucas v. Allen*, 80 Ky. 681. It is also bad on the ground of maintenance. As to a sale of a court clerk's emoluments, *Field v. Chipley*, 79 Ky. 260, see *supra*, Section 114, n. 10.

jail, and was to be paid for doing so, was sustained, the facts before the court showing fairness, and that there was no extortion.⁷

IV. *Contracts in Restraint of Trade.* The courts of Kentucky have, in accordance with the modern English rule, sustained agreements, made upon a sufficient consideration, to abstain from a certain trade at some named place. And a clause in the deed for a lot, that no liquor shall be sold thereon at retail, was sustained as a covenant running with the land, and this without any reference to the evils of the liquor traffic; the vendor, however, having his dwelling-house near by, was interested in the enforcement of the clause.⁸

A combination between two rivals in trade to divide the profits of both in a given ratio (or what in the language of modern trade is called a Trust) is unlawful at common law, especially when the trade is that of a common carrier, and a contract, of which such an arrangement is the main feature, is void altogether, even as to an agreement which, being only in local restraint of trade, might otherwise be lawful.⁹ A late statute not only forbids all "pools, trusts, and conspiracies" of this nature, but it provides "that any purchasers of property or article, or of any commodity, from any individual, firm, or corporation transacting business contrary to the act, shall not be liable for the price of such article, etc., and may plead this act as a complete defense, etc."¹⁰

V. *Unlicensed Dealing.* Chitty in his work on Contracts lays down the rule that a man does not lose the benefit of his contracts by failing to pay a license tax imposed on his trade for revenue purposes, and his authority was followed in 1857 in sustaining the suit of an unlicensed bill broker on a bill

⁷ Trundle's adm'r v. Riley, 17 B. M. 396. An agreement with the jailer to keep and board the defendant's slave at the jail under private contract was held void, as against public policy. (Miller v. Porter, 8 B. M. 282.)

⁸ Sutton v. Head, 86 Ky. 156.

⁹ Anderson v. Jett, 11 Ky. L. R. 570; a combination between the owners of two steamboats on the Kentucky River, on the model of the pooling arrangements between the great trunk railroad lines.

¹⁰ Session Acts, 1889-90, p. 143.

bought by him, though he was liable to a fine for buying it.¹¹ But in 1870 a note given for *moonshine* spirits, the "brandy not having been inspected, nor had any tax been paid thereon, nor the barrels branded, etc., and the same having been sold in violation of the laws of the United States," was held unenforceable; which may be justified, as the tax on spirits is an excise entering heavily into the cost of the article.¹²

Formerly three kinds of contracts, if made without the license required by law—sales by peddlers, sales of liquor by tavern keepers and others, and contracts for the use of studs, jacks, and bulls¹³—were rendered void by the words of the statute. But the chapter of the General Statutes containing this clause is repealed by the revenue law of 1886, which is wholly silent on the subject. Messrs. Bullitt and Feland, in their notes (p. 982), express the opinion that as a sale by an unlicensed peddler is made a misdemeanor,¹⁴ it should be deemed void, even without such an express provision; but the first named case seems to the writer to establish the opposite rule.¹⁵ However, as to the sale of liquors in small quantities, there is hardly a doubt that the old rule as laid down in 1844, when there was no express avoidance by the statute, still prevails,¹⁶ and that an unlicensed dealer can not recover for liquor sold by the small; for the laws for licensing the sale of liquors are as much police regulations as revenue laws.

VI. *The Sunday Law.* By a section of the criminal laws "no work or business shall be done on the Sabbath day except the ordinary household offices, or other work of necessity¹⁷ or charity." To swap horses on that day is therefore illegal; and, while the executed contract stands, the warranty of sound-

¹¹ *Lindsay v. Rutherford*, 17 B. M. 248. *A fortiori* a city license; comp. *Dolfinger v. Fishback*, 12 Bush, 474.

¹² *Creekmore v. Chitwood*, 7 Bush, 317.

¹³ G. St., Ch. 92, Art. III, Sec. 6. Older laws were very pointed as to clock peddlers.

¹⁴ *Ibid.*, Ch. 84, Sec. 2.

¹⁵ See *Rash v. Holloway*, 82 Ky. 674, commented on *supra*, Sec. 12, n. 1.

¹⁶ *Vannoy v. Patton*, 5 B. M. 248.

¹⁷ The running of not only passenger trains, but even of freight trains on railroads is justified in *Commonwealth v. L. & N. R. R. Co.*, 80 Ky. 291, Hargis, J., dissenting.

ness is invalid.¹⁸ In late years the Sunday law as invalidating contracts has been treated with but little respect. Where a principal and surety on Sunday signed and delivered a note for the loan of money, and the surety before a check for part of the money was collected did some acts *in pais* ratifying the loan on a subsequent work-day, it was held that his obligation had not become final on Sunday, and that he was liable on the note.¹⁹

SEC. 182. SATISFACTION AND RELEASE. The common law rule, that an accord without satisfaction does not sustain a defense to the old cause of action, was, in an early Kentucky case, drawn to its legitimate conclusion: that the promise which is to take the place of a former obligation, for instance, the promise of one who had committed a fraud in the sale of a note, to pay back the amount received for it in discharge of his liability for the fraud, is invalid, and will not support an action; ¹ while a promise on a mere moral obligation, like that to pay a debt barred by limitation or bankruptcy, is binding.

An accord and satisfaction made by a stranger to the contract is good in equity, though not pleadable at law.²

The law of Kentucky dispensing with seals and scrolls to private writings should turn every receipt, in which an intention is indicated to consider a debt as paid, into a technical release; but such a point seems not to have been relied on in the reported cases.

The older decisions on "accord and satisfaction" are very narrow, and would hardly be followed at this day. A transfer of notes and accounts was held not to be a good satisfaction, because accounts are not assignable at law: as if an equitable right had no value.³ The technical rule, that a smaller sum can not be accepted in full of a larger sum then due, is recognized as late as 1860, and again in 1882.⁴ But compositions

¹⁸ *Murphy v. Thompson*, 15 B. M. 419 (1844).

¹⁹ *Campbell v. Young*, 9 Bush, 240.

¹ *Elliott v. Dorsey*, 3 Mon. 269.

² *Stark's adm'r v. Thompson's ex'r*, *Ibid.*, 296.

³ *Nave v. Fletcher*, 4 Litt. 243.

⁴ *Fenwick v. Phillips*, 3 Metc. 87; subject to the well-known exceptions. See *Cumber v. Wane*, and notes in *Smith's Leading Cases*, and *Robert v. Barnum*, 80 Ky. 28.

of a debtor with his creditors are upheld, as based on a sufficient consideration.⁵

The right to compromise an unliquidated claim by the payment of a fixed sum is undoubted. And though one person be entitled to half the profit made by another in a certain business, and the amount of that profit be known, yet the receipt of a smaller sum "in full of all claims to date" is binding when obtained without fraud or concealment; the claim to the half profits not being considered a liquidated debt.⁶

A valid obligation will not be merged into a void one to the creditor's prejudice. Thus, an infant remains bound for necessities on the *quantum valebant*, after giving his note;⁷ a partner on the partnership debt, though after dissolution the other partner had attempted to bind him by a note, and though the old note was surrendered;⁸ and where one partner attempts to give a sealed instrument for a firm debt, which is not binding as such, the creditor at his option may sue on the old debt.⁹ But where the creditor, knowing that a purchase is made for a partnership, accepts the note of one partner in payment, the other is not bound, or if ever bound, is released.¹⁰

Where a person was assaulted and wounded, and had accepted a sum of money from his assailant in satisfaction for the wrong, his widow was not barred thereby from suing, under the statute, to have vindictive damages for causing her husband's death by the wanton use of fire-arms or other deadly weapons (see *supra*, Section 177), as her claim is wholly distinct from that of the decedent.¹¹

Where a satisfaction is accepted from a railroad company for a personal injury, and a formal release executed for all claims; the accord, satisfaction, and release are liable to be set.

⁵ Ricketts v. Hall, 2 Bush, 249.

⁶ Robert v. Barnum, *ubi supra*. There was a composition here signed by all the creditors, as an agreement among themselves. The opinion says "the agreement to release by one is a sufficient consideration for the release by the other." *Qu.* Would this apply to such an agreement between

only two out of many creditors?

⁷ See *supra*, Sec. 145, n. 7.

⁸ Turnbow v. Broach, 12 Bush, 455.

⁹ Doniphan v. Gill, 1 B. M. 199.

¹⁰ Macklin's ex'r v. Crutcher, 6 Bu. 401, *ov'rr's* Hikes v. Crawford, 4 Bu.

¹¹ Donahue v. Drexler, 82 Ky. 157. The suit is given to the widow and minor children, not to the "estate."

aside for "duress." And there is such a thing as pecuniary duress. A traveler being far away from home, and without funds, and one leg having been amputated, accepted, while under the influence of opiates, payment of his board bill and for the medical attendance, together with a ticket to Colorado and one hundred dollars in money—a most inadequate compensation—as in full. Though the weight of evidence showed that the plaintiff understood the terms, it was held that the release was obtained by playing on his necessities, and that it did not debar him from further recovery.¹²

SEC. 183. RELEASE OF SURETIES. As a rule, any agreement made by the creditor with the principal debtor, giving him time, or the relinquishing of liens or securities for the debt, in either case without the surety's consent, releases the latter altogether, or at least to the value of such liens or securities. The principle is recognized by the Kentucky courts, but its details as settled elsewhere are not always regarded. Whether it can be invoked by those who have become "makers or acceptors" for the accommodation of secondary parties to a note or bill has not been decided in Kentucky; but one of three joint sureties, to whom the principal turned over property wherewith to pay the debt, was thereafter treated as principal.¹ Payment of interest in advance, and its acceptance by the creditor, is a binding agreement, though it may be disguised as a credit.² There is no reason why the payment of interest at six per cent, or even at a lower rate, should not bind the creditor, and therefore release the surety, for the creditor may be glad to earn any interest. But the mere promise of usurious interest, even if it takes the shape of a new note, or of a credit on the debtor's book, is unenforcible; it is no consideration for a promise of forbearance, and does not avail the surety.³

Contrary to the precedents under the English bankrupt law, it was held that the assent of a creditor to a "composi-

¹² Buford v. L. & N. R. R. Co., 82 Ky. 286. Kenningham v. Bedford, 1 B. M. 325.

¹ Martin v. Taylor, 8 Bush, 384. ² Tudor v. Goodloe, 1 B. M. 322;

³ Preston v. Henning, 4 Bush, 556; Anderson v. Mannon, 7 B. M. 217;

Patton v. Shanklin, 14 B. M. 15.

tion" offered by the principal debtor, though withdrawn before it became operative, worked a discharge of the surety.⁴ As an illustration of "giving up of securities," it was lately held in a building case, where the owner had the right to hold back fifty per cent of the agreed price for a building until its completion, that by paying up the contractor before completion he released the surety in the building contract.⁵ Even an infant, by failing to prove his claim against the estate of his deceased guardian, released the guardian's surety.⁶ An order to the sheriff to return an execution levied upon the property of the principal, or the suspension or release of such a levy, releases the sureties.⁷ Where the plaintiff, in an execution on which two men were bound as sureties, assented to its levy on certain lands of the principal, and bid them in himself; and these lands being afterward taken from him in a suit under the law against preferences, he had the return of "satisfied" on the execution quashed; he was not thereafter allowed to proceed against the sureties, when so much had been done through his co-operation to delay and defeat their recourse.⁸

But the mere failure to collect the demand from the principal while he is solvent, or to levy on such property as he may have, does not exonerate the surety.⁸

Where the form of the obligation does not show who is

⁴ *Calloway v. Snapp*, 78 Ky. 56. *Quære*: Is not the promise to pay usury in law a promise to pay six per cent? Why then should it not make a valid contract?

⁵ *St. Mary's College v. Meagher*, 11 Ky. Law Rep. 112.

⁶ *Stull v. Davidson*, 12 Bush, 168. It is reasoned out on other grounds.

⁷ *Martin v. Taylor*, *ubi supra*; *Dills v. Cecil*, 4 Bush, 579. And where the execution was assigned to the sheriff, like relief was given to the surety for a wrongful refusal by the sheriff to sell the principal's property he had levied on. *Miller v. Dyer*, 1 Duv. 263, where the decision in *Finn v. Stratton*, 5 J. J. Mar. 364, denying any responsibility

by the sheriff to the surety in an execution, is said to have been overruled by later cases. A mere indefinite stay of a levy, leaving the creditor free to resume proceedings at any time is of no effect. (*Stringfellow v. Williams*, 6 Dana, 236.)

⁸ *Newman v. Hazlerigg*, 1 Bush, 414.

⁸ *Brown v. Monroe*, 11 Ky. Law Rep. 324; hence one surety paying the debt while the principal holds property is not barred from suing his joint sureties. But see *Aaron v. Mendel*, 78 Ky. 427, on laches in setting aside a fraudulent receipt gotten by the guardian and thereby discharging his bondsmen.

principal and who is surety, an assignee who may not know the relation of the makers among themselves will not, by giving time to that one of them who is the real principal, lose his recourse on the other.⁹ But the payee is presumed to know which of two makers received the consideration,¹⁰ and in a late case of giving up securities, where the position of principal and surety arose from subsequent dealings between the makers, the court intimated that the creditor's knowledge on this subject was immaterial.¹¹

It seems that where a note of principal and surety is surrendered by the creditor to the principal against a renewal note on which the surety's name is forged, the latter remains bound on the old note; and a collection in part of the new note out of the principal's estate, with knowledge of the forgery, being for the benefit of the surety, will not discharge him.¹²

It is said that the utmost fairness ought to prevail in the very contract of suretyship. Where a bank president induced A. to become surety for B. to the bank, by telling him that B. owned stock in it, which was subject to the bank's lien, when in fact the stock stood in the name of B.'s wife, but was, in the president's opinion, liable to B.'s debts, A. was exonerated.¹³ But the mere inclusion of heavy usury in a note, without the surety's knowledge, was not deemed a fraud on him.¹⁴ And in continuing suretyships (such as that for the good conduct of an insurance agent), the creditor who consents to an increase of the risk without the surety's assent releases him from liability for subsequent acts of the principal.¹⁵

The rulings as to the effect of a "novation" between the creditor and principal without the consent of the surety are supposed to be in accord with the general current of Ameri-

⁹ Neel v. Harding, 2 Metc. 247.

¹⁰ Champion v. Robertson, 4 Bush, 17.

¹¹ Martin v. Taylor, *ubi supra*.

¹² McMakin v. Stratton, 80 Ky. 226.

¹³ Woolley v. Louisville Banking Co., 81 Ky. 527.

¹⁴ Burks v. Wonterline, 6 Bush, 21;

Mount v. Tappy, 7 Bush, 617.

¹⁵ Connecticut M. L. I. Co. v. Scott, 81 Ky. 540 (the agent took a partner, and the company thereafter for years corresponded with the partnership); see also Graves v. Lebanon National Bank, 10 Bush, 23, quoted *supra*, Sec. 150, n. 7.

can law.¹⁶ A note payable *one day* after date, accepted by a legatee from the executor in payment of a legacy, is not such an extension of time as would avail the surety on the executor's bond;¹⁷ the court sitting in equity could not decide whether it was a merger or satisfaction at law. We have seen that replevy or sale bonds, when deficient, work a merger until quashed.¹⁸ A note or bond given by the surety alone to a creditor for a smaller sum than the joint obligation, in consideration of his release from the latter, is binding.¹⁹ Where the creditor accepts from one of two sureties his individual note in full of a judgment, and assigns the latter to him, he may use it to the end of coercing one half from the other surety, though he has not paid his note.²⁰ A release of part of the sureties by act of the law, under the statutes providing for such release of sureties on fiduciary and official bonds, does not release the others.²¹

The statute has given the surety a further protection, not only against the principal, but against his co-surety, and so to any co-obligor, or co-defendant in a judgment, as far as he is liable for more than his own share of the judgment or obligation. He "may by notice in writing, served in person within the State, on the creditor, or if [the latter] be a non-resident or absent from his residence for thirty days consecutively, upon his agent or attorney, require him to sue or issue execution; and if the creditor shall not sue to the next term thereafter at which he can obtain judgment and in good faith prosecute the suit with reasonable diligence, or shall not within ten days sue out execution and in good faith prosecute the collection thereof, such *co-surety*, co-obligor, etc., shall be discharged, etc., except for the proper share, etc.;" and the written notice here

¹⁶ *Ruble v. Norman*, 7 Bush, 582. In *Norton v. Roberts*, 4 Mon. 492, it was said that novation to relieve in equity need not be such as would operate as a merger or satisfaction at law. Novation discharges a surety even when he is an attesting witness to the new instrument. (*Edwards v. Coleman*, 6 Mon. 567, 575.)

¹⁷ *Cooper v. Fisher*, 7 J. J. Marshall, 396.

¹⁸ *Supra*, Sec. 153, nn. 4-7.

¹⁹ *Covington v. Clark*, 5 J. J. Marshall, 59.

²⁰ *Stubbins v. Mitchell*, 82 Ky. 535.

²¹ *Boyd v. Clark*, 3 Bush, 644, and see *supra*, Secs. 156 and 157.

required, can only be waived in writing.²² A request by word of mouth is therefore immaterial, and the creditor having brought a suit on such request does not lose his recourse by dismissing it.²³ Where the wife before coverture became the surety, a notice signed by her husband alone is sufficient.²⁴ The Superior Court held, where all the parties lived in the same county within three miles of the court-house, that a notice served on the creditor three days before the last day on which suit could be brought to the next term, and not acted upon, put the creditor in default and released the surety.²⁵

NOTE ON ALTERATIONS IN WRITINGS.—“Alteration” came up several times in suits against indorsers or sureties:

In *Lisle v. Rogers*, 18 B. M. 528, an accommodation “assignor” handed to the maker an indorsed note, bearing the date December 4th. The latter, before raising money upon it, changed the date to December 10th. The change was deemed material, as a postponement of maturity increases the assignor’s risk.

In *Terry & Bell v. Hazelrig*, 1 Duv. 104, the sureties signed in March a bond prepared in February, and containing the name of that month in the blank for the date. The clerk charged with taking the bond struck out February and inserted “March 30,” according to the facts. Held, no alteration.

In *Woolfolk v. Bank of North America*, 10 Bush, 504, the accommodation indorser left with the acceptor an indorsed bill, otherwise in blank, but with the figures “\$500.00” in the margin. The acceptor raised these figures to “\$5,000,” and filled the bill up for that amount. The “margin” being not considered a part of the bill, this was held neither a forgery nor an alteration.

In *Duker v. Frantz*, 7 Bush, 273, a note was signed by principal and surety in February, 1869, and a date in February, 1868, was inserted. The holder corrected the “8” into “9.” This was held not to destroy the note, as the change only conformed it to the intention of the parties.

In *Bank of Commonwealth v. McChord*, 4 Dana, 191, a change in the date, though unimportant, was said to be always fatal (somewhat shaken by remarks in *Lisle v. Rogers*), but the addition of other obligors to a note left in blank is said to be authorized and not an alteration. Otherwise, when the note is complete. (*Bank of Limestone v. Penick*, 5 Mon. 25.)

SEC. 184. COSTS AND DAMAGES. The former discretion resting with the courts, especially with equity courts, in the

²² Gen. Stat., Ch. 104, Sec. 11. The word “surety” before *co-surety* is not in the printed statutes. The omission is not noticed in the cases arising under it.

²³ *Hibler v. Shipp*, 78 Ky. 64.

²⁴ *Medley v. Tandy*, 85 Ky. 566.

²⁵ *Weir v. Dicker’s adm’r*, 11 Ky. Law Rep. 523.

matter of costs, has been much abridged by the statute, which, generally speaking, demands that "the party succeeding in any civil action, on the merits or otherwise, shall recover costs," with a proviso in equitable actions, that costs shall not be awarded against nominal parties, or those parties against whom no judgment is rendered.¹ Where a demand for over fifty dollars, which is within the jurisdiction of the Circuit Court, whether in tort or in contract, results in a judgment for less than fifty dollars, the plaintiff is entitled to his costs.²

The same rule, that success entitles to cost, governs appeals to the Court of Appeals or Superior Court, at least on affirmals; the Appellate Court has a discretion about costs, where the appellant only succeeds in reducing the judgment against him.³

Costs are awarded against a personal representative who is unsuccessful, either as plaintiff or defendant, but are to be levied only *de bonis testatoris*,⁴ and he does not become bound otherwise, or in his own right, though he may appeal and supersede.⁵ Where the "nominated executor" is defeated in his effort, made in good faith, to probate the will, the costs on both sides should not be paid by him, but by the estate; and he should even be allowed his counsel fees and other necessary outlays in the litigation.⁶

Suits in *forma pauperis* are authorized, and upon the uncontradicted affidavit of the plaintiff the court is bound to make the proper order to let the poor plaintiff, or the insolvent next friend of a poor infant, have the services of the officers of the court.⁷

¹ Gen. Stat., Ch. 26, Secs. 12, 13.

² *Brandeis v. Stewart*, 1 Metc. 396. Under Section 11 of the act establishing the Jefferson Court of Common Pleas (1865, Myers' Suppl., p. 563) that court may refuse to award costs to the plaintiff in suits for trespass, libel, slander, breach of marriage promise, etc., where he recovers no more than five dollars. There is no "forty shilling act" in force elsewhere in the State.

³ Gen. Stat., Ch. 26, Sec. 15, modified

by Sec. 35 and by Code of Practice, Sec. 728.

⁴ Gen. Stat., Ch. 26, Sec. 17.

⁵ *Fitzpatrick v. Todd*, 81 Ky. 524; see *supra*, Sec. 15, subs. 2, notes 12, 13.

⁶ *Gilbert v. Bartlett*, 9 Bush, 49; *Phillips v. Phillips*, 81 Ky. 328. It might be different where he expected to be the only gainer by the establishment of the will; see *supra*, Sec. 134, n. 8.

⁷ Gen. Stat., Ch. 26, Sec. 1; *Westfield v. Wilson*, 12 Bush, 125.

A defendant obtaining judgment against the Commonwealth, where it sues in its own right, is not entitled to costs.⁸

Unless the amount involved aside of interest and costs be under fifty dollars, the successful party recovers an attorney's fee, but not upon a claim against an insolvent estate, and only one fee, though there be several judgments on motion in the same case.⁹ But where a stranger, such as a bidder at a judicial sale, is drawn into the litigation, he ought to have full costs; and where such a bidder, without fault of his own, loses the benefit of his bid, he should even have his counsel fee.¹⁰ An attorney who brings suit for a non-resident is liable to the defendant and to the officers of the court for costs, unless a bond be given; not, however, if he prosecutes an appeal for a non-resident defendant.¹¹

As to "damages" upon affirmance or the dismissal of an appeal, the courts of Kentucky have no longer any discretion. Where a judgment "for the payment of money" is superseded in whole or in part, and where such a judgment against a railroad or insurance company or any foreign corporation is appealed at all, ten per cent damages are awarded, on affirmance or dismissal, on the amount superseded, and in the latter case on the judgment appealed from.¹² It must be a judgment

⁸ Gen. Stat., Ch. 60, Sec. 6. The cost of a reference in such a case must not be charged to the successful defendant. (*Commonwealth v. Todd*, 9 Bush, 208.)

⁹ In appellate courts in equity \$10, at common law \$5; in circuit or like court in land cases \$10; other equity cases \$5, law \$2.50; in county or quarterly court \$2.50; G. St., Ch. 41, Art. XII; Ch. 26, Secs. 32, 26, 31, 33. The Commonwealth is entitled to a docket fee of two per cent on the amount recovered for the benefit of the Attorney General (Gen. Stat. Ch. 5, Art. V, Sec. 4); and if a suit has to be brought for the enforcement of the judgment at law (even a cross-peti-

tion), the fee of two per cent is chargeable in that. *Newport & C. Bridge Co. v. Douglass*, 12 Bush, 673, 719.

¹⁰ *Egard v. Chearnley*, 1 Bush, 12.

¹¹ Code of Practice, Sec. 621; *contra*, *Christmas v. Russell*, 2 Met. 112. (Note: As to costs in suits for divorce and alimony see *supra*, Sec. 144; costs and fees in partition and settlement suits, see Sec. 134; on continuances and new trials can not be treated in this work.)

¹² Code of Practice, Sec. 764, and act amending that section, of April 19, 1888, which is printed under it in Carroll's Code.

in personam, not one to sell property to satisfy a demand,¹³ or dissolving an injunction against a prior judgment;¹⁴ and where the judgment *in personam* is affirmed, damages are awarded, though the order of sale accompanying it be reversed.¹⁵ No damages are awarded on the costs adjudged,¹⁶ but it seems that they should be on the interest accrued at the time of the judgment below, and which is embraced therein. Where a judgment for the plaintiff is rendered on the verdict of a jury, and after an appeal with supersedeas by the defendant, the plaintiff takes a cross-appeal, on which there is a reversal, awarding a *venire de novo*, he can not have damages, though the case is affirmed on the defendant's appeal.¹⁷

But in awarding damages on the dissolution of an injunction to stay proceedings on a judgment, the Chancellor has an ample discretion, and may be aided by a jury impaneled for that purpose. Where the collection of money had been restrained he may award not exceeding ten per cent, which is in addition to current interest, like the damages upon an affirmance; and he may also award "the value of the use, hire or rent" of property, the delivery of which has been delayed, and the assessment is conclusive against the surety in the injunction bond.¹⁸

The discretion here given to the Chancellor is judicial, and in a proper case, where the party seeking the injunction had a strong equity, he may and ought to award nominal damages only.¹⁹

¹³ *Madison, etc. R. R. Co. v. Briscoe*, 18 B. M. 570; *Rowan's ex'r v. Pope's adm'r*, 14 B. M. 102.

¹⁴ A number of decisions from *Hardin* to *Littell*, followed by the Super'r Court in *Mulholland v. Troutman's adm'r*, 10 Ky. Law Rep. 263; but damages are awarded on the damages on dissolution.

¹⁵ *Leopold v. Turber*, 84 Ky. 214. In *Covington Short Route v. Piel*, 87 Ky. 267, 278, there was no judgment for money in favor of appellee, but a condemnation under Eminent Domain; hence no room for damages.

As to the necessity of the *supersedeas* having been issued, see *supra*, Sec. 155, n. 46.

¹⁶ *Handley v. Russell, Hardin*, 145, 146.

¹⁷ *Wade v. First National Bank*, 11 Bush, 697. So held, though the case had been tried by the court, not by a jury.

¹⁸ Code of Practice, Sec. 295. If no damages are assessed, none can be recovered on the bond; see *supra*, Sec. 155, n. 12; also *Crawford v. Woodworth*, 9 Bush, 745.

¹⁹ *Mallory v. Dauber*, 83 Ky. 239.

CHAPTER XXX.

LIMITATION IN CONTRACT AND TORT.

SEC. 185. Length of the Bar.

SEC. 186. Disabilities and Other Modifications.

SEC. 187. New Promise and Partial Payment.

SECTION 185. LENGTH OF THE BAR. The length of time in which actions other than for real estate are barred is regulated by the third and sixth articles of the Chapter on Limitations (General Statutes, Chapter 71).¹ The longest limitation is fifteen years. Stripping the law of its verbiage, there are subject to this limitation :

1. All judgments rendered by any court within the United States, counting from the date of the last execution issued upon them.

2. All demands *against the principal* upon any recognizance, bond, or written obligation, other than bills of exchange or negotiable notes.²

The limitation of five years, taking the place in the main of the six years in the English statute, applies to demands upon unwritten or unsigned contracts, on bills of exchange, checks, drafts, "or any indorsement thereof, or upon a promissory note put upon the footing of a bill of exchange" (see *supra*, Section 160) ; accounts for merchandise between merchant and merchant, the bar to run "from the time of the last item proved in the account" on either side ; all actions of tort, for which a shorter limitation is not given, actions for penalties, or on statutory obligations where no other time is named in the statute ; to actions against bail, and to actions for "relief from fraud or mistake, or damages for either," counting from the discovery thereof, the action not to be brought more

¹ See *supra*, Sec. 112, as to claims to chattels.

² Ch. 71, Art. III, Sec. 1.

than ten years from the making of the contract or the perpetration of the fraud.³

A limitation of one year applies to actions for injury to the person, and to "cattle or stock by railroads, or by any company or corporation;" for a malicious prosecution, *conspiracy*, *arrest*, seduction, criminal conversation, or breach of promise of marriage; for libel or slander, or for an "escape," or for the recovery of usury "paid;" to any action against the thief or his accessory, or for the recovery of stolen property or its value, or damages therefor, counting from the time of discovery.⁴

"An action upon a merchant's account for goods, etc., sold and delivered, or any article charged on store account, shall be commenced within two years, etc., . . . the limitation shall be computed from the first day of January next succeeding the . . . times of the delivery of the several articles charged."⁵

An action for relief "not named" is barred in ten years.⁶

The right of action on the bond of a fiduciary, executed when the beneficiary is an infant, accrues, for the purpose of limitation, unless otherwise expressed in the bond, when the infant becomes of age; and if several infants are interested, then "the right of action of each one of such infants" shall accrue when he comes of age.⁷ The limitations of "this chapter" apply to the Commonwealth in like manner as to private persons.⁸

The bar of fifteen years is shortened to seven in favor of a surety, whether he be bound by a judgment or decree, by a bond taken in the course of judicial proceedings, or by a written obligation *in pais*; and the time on a judgment is not to be broken by issuing an execution, unless it be "prosecuted in good faith."⁹ A surety on the bond of a fiduciary is "discharged from liability" when five years have elapsed after

³ *Ibid.*, Secs. 2, 6, 7. As to statutory obligation see also *supra*, Sec. 99, n. 6. As to "fraud and mistake" when affecting land, *supra*, Sec. 99, n. 9.

⁴ *Ibid.*, Secs. 3 and 4, and Art. VI, Sec. 6.

⁵ Ch. 71, Art. III, Sec. 5.

⁶ *Ibid.*, Sec. 9.

⁷ *Ibid.*, Sec. 8.

⁸ *Ibid.*, Sec. 10.

⁹ Ch. 71, Art. VI, Secs. 1, 2, 4.

action accrued, and after the devisee, distributee, or ward comes of age; "the failure to commence action by one shall not affect the right of another."¹⁰ Seven years from the death of a person liable in contract, or on a judgment, bar an action against his heirs or devisees, jointly with his representative, if his estate has been distributed and divided; and seven years from the qualification of the representative bar such an action against him, if he has settled his accounts and made full distribution of the assets in his hands.^{10a}

I. *The Fifteen Years' Bar.*

Where an execution issues on a judgment after the lapse of fifteen years, it must be quashed.¹¹ A due bill is a written obligation, and barred only in fifteen years.¹² A surety may, when he pays his principal's debt, have, by voluntary arrangement or by proceedings under the law, a transfer of a judgment, and, in the former mode, of any note or bond, in which case his claim will be good for fifteen years.¹³ The claim of the devisee against the executor, ward against guardian, etc., for any money balance can not be extended beyond the fifteen years, during which, after accrual of the debt, he is liable upon his bond, upon the ground of an "express and subsisting trust."¹⁴

II. *The Five Years' Bar.*

Where a surety does not, when he pays a specialty debt, take an assignment, his claim against the principal and co-sureties is on an implied assumpsit only, and is barred in five years,¹⁵ which run from the date of payment.¹⁶

An attorney can be sued for money collected on behalf of his client only after a demand and refusal, and limitation only

¹⁰ *Ibid.*, Sec. 3.

^{10a} Gen. Stat., Ch. 71, Art. III, Secs. 6 and 7.

¹¹ Lockhart v. Yeiser, 2 Bush, 231.

¹² White's adm'r v. Curd, 86 Ky. 191.

¹³ Joyce v. Joyce's adm'r, 1 Bush, 474, *arguendo*. See *supra*, Sec. 68, nn. 26, 27, as to mode of obtaining transfer of judgment.

¹⁴ Hargis v. Sewell's adm'r, 87 Ky.

63. See *supra*, Sec. 156, n. 14, as to time when distributive shares are due.

¹⁵ Joyce v. Joyce's adm'r, *ubi supra*, and see cases in next note.

¹⁶ Bowman v. Wright, 7 Bush, 375; Robinson v. Jennings, *Ibid.* 630; if several payments, then as to each from the time it was made. The bar runs not from the time of replevying the debt, but from that of actual payment. (Hikes v. Crawford, 4 Bush, 19.)

then begins to run ; still it was intimated that a lapse of five years might, together with the circumstances surrounding it, raise a presumption of payment.¹⁷

The warranty of title implied in the sale of a chattel is, like a covenant of seizin, broken as soon as made, and the limitation of five years thereon runs from the day of sale.¹⁸

The limitation against the assignor of a note, upon his implied warranty of the validity of the note and of the maker's solvency, begins to run from the time when the assignee is cast in his suit against the obligor, or has gone through all the steps which go to make up "due diligence."¹⁹

A merchant tailor is a merchant within the meaning of the five years' limitation law, in respect of goods which he buys for his trade.²⁰

The penalty of thirty per cent on the amount of an execution which the law denounces against the sheriff for not making his return within thirty days after the return day, though it be secured by the official bond, is, as a "liability created by statute," or as a "penalty," barred in five years.²¹

As all distinction between actions of law and in equity as to the running of limitation was put at an end by the Revised Statutes, a ruling, by which the limitation of a suit by a firm against their book-keeper for injury arising from a fraudulent entry was made to run from the time of the entry, and not from the time when it was discovered, is perhaps no longer good law.²²

The Revised Statutes made the limitation in actions for fraud and mistake, in the words of the present statute, to run from the "discovery" thereof; but in construing them the Court of Appeals interpolated the clause "or from the time when the plaintiff might by reasonable diligence have

¹⁷ Roberts v. Armstrong, 1 Bush, 263.

¹⁸ Chancellor v. Wiggins, 4 B. M. 201. It was a sale of two slaves who afterward established their freedom.

¹⁹ Hunt v. Armstrong's adm'r, 5 B. M. 399; judgment went in favor of the maker upon a set-off, and it was

not deemed such a case of fraud (see *supra*, Sec. 163), in which an action for the consideration of an assignment would lie at once.

²⁰ Hearn v. VanIngen, 7 Bush, 426.

²¹ Royse v. Reynolds, 10 Bush, 286.

²² Ellis v. Kelso, 18 B. M. 296; see note 6 in B. and F. Gen. Stat., p. 894.

made the discovery;" and this seems to have become the settled construction, as we have shown in treating of limitations in actions for land.²³

III. *The One Year's Bar.*

In an action for causing a wrongful arrest the limitation runs from each day of imprisonment, for the sufferings of that day.²⁴

The *per quod* action which the common law gives to the father for the seduction of the daughter does not fully accrue until her *recovery* from childbed, and the limitation runs from that time.²⁵

IV. *The Seven and Five Years' Limitation against Sureties.*

One signing in form as a surety for a married woman is in law a principal, as the bond is void as against her, and he is not entitled to the seven years' limitation.²⁶ And where principal and surety are sued on a note, and the former is discharged on the ground of infancy, the judgment is the sole debt of the latter, and is not barred by a delay of seven years in issuing execution.²⁷

But where a bond or recognizance for costs was executed by a surety for a non-resident litigant, who did not join in the bond, and judgment went against the latter, the obligation of the bondsman was deemed to be that of a surety, and barred in seven years from the date of the judgment for costs.²⁸

The mortgage of a married woman given for her husband's debt, though it does in substance, does not make her in form his surety, and it is not barred in seven years.²⁹ On the other hand, the liability of a surety in a note is not extended by his giving a mortgage on his own property for the amount.³⁰

²³ See also *Dye v. Holland*, 5 Bush, 635; suit to recover for a deficit in a sale of lands.

²⁴ *Huggins v. Toland*, 1 Bush, 192; but see subsec. 5, *infra*.

²⁵ *Wilhoit v. Hancock*, 5 Bush, 567.

²⁶ *Gaines' adm'r v. Poor*, 3 Metc. 503. There were articles of separation between husband and wife; the defendant became surety for the

wife; she repudiated the agreement, and claimed dower; and more than seven years thereafter the administrator sued on the articles, and was held to be in time.

²⁷ *Short v. Bryan*, 10 B. M. 10.

²⁸ *McClure v. McKee*, 14 B. M. 265.

²⁹ *Hobson v. Hobson*, 8 Bush, 665.

³⁰ *Kellar v. Hinton*, 14 B. M. 308.

If the remedy against a surety be already lost by lapse of time, it can not be revived in favor of another surety who, being still bound, pays the debt to the creditor.³¹

A guardianship ceases as soon as a female ward marries; yet under the words of the Statute the five years' limitation against the surety does not begin to run till the late ward, now freed by marriage from her wardship, comes of age.³² If the distributees or legatees are of age, the sureties on the executor's or administrator's bond will be released in five years and nine months from his qualification, but the burden is on the sureties to show that the former were of age at the end of the nine months.³³

V. *General Principles.*

The plea of limitation was twice set up in actions against a county judge for failing to take a proper guardian's bond. In one case the suit was brought by an adult, namely, the old surety in a guardian's bond, for negligently failing to have a new bond filled up. It was held that if the act was unlawful, and actionable at all, the injury arose and accrued at once, and not many years afterward, when the old surety was compelled to pay for the guardian's default; and the court in answer to the opposite view, said: "This process of reasoning would apply to all actions for personal injuries, and every new development of the injury would give a new cause of action."³⁴ In a late case the ward himself brought the suit within one year after coming of age, but more than five years after the neglect to take a good bond, which is made actionable by statute, and he was held to be in time, no other reason being given, from the mere necessity of the case.³⁵

An action is begun under the provisions of the Code of Practice, as stated heretofore, by filing the petition and causing a summons to be issued or a warning order to be entered; the General Statutes require further, that the process must, in

³¹ *Shelton v. Farmer*, 9 Bush, 314; *Cochran v. Walker's ex'r*, 82 Ky. 220.

³² *Finnell v. O'Neal*, 13 Bush, 176; but the fifteen years against the principal begin to run from the marriage.

³³ *Murrell's adm'r v. McAllister*, 13 Bush, 311, 318, relying on *Hayden*

v. Hayden, 3 Metc. 289, decided under an act of 1838.

³⁴ *Kinnison v. Carpenter*, 9 Bush, 599.

³⁵ *Commonwealth v. Netherland's adm'r*, 87 Ky. 196.

order to stop the running of limitation, be issued in good faith.³⁶ It runs till the petition is amended so as to state a good cause of action, or its defects are cured by an answer.³⁷

Limitation must be pleaded,³⁸ and each obligor must plead it for himself,³⁹ unless indeed (which can hardly ever happen) the petition should negative every fact that under the statute would extend the time for bringing suit.⁴⁰

VI. *Suits for and against the Commonwealth.*

Whenever the Commonwealth, or a city under its authority, has an action given to recover a tax, it is barred by limitation in five years from the time at which the right to sue arises, which only happens after the tax has been properly assessed.⁴¹

The "summons" in the nature of a *scire facias* upon a forfeited bail bond in a criminal prosecution must be issued within five years of the forfeiture.⁴² A mandamus to compel the Auditor to make out his warrant for an official salary is likewise barred in five years.⁴³ But a proceeding to adjust accounts between two departments of the Government (the Board of School Trustees of Louisville being such a department) is not embraced in the Statute of Limitations.⁴⁴

NOTE.—As to time for enforcing bonds having the effect of a judgment, see *supra*, Section 153, nn. 10, 17. As to limitations by special acts, see *supra*, Section 16, nn. 4, 6, 10, 11, 12.

NOTE.—See *supra*, Section 6, for a six months' limitation, granted by special laws in favor of the Louisville & Nashville Railroad Company, as to injuries to stock (note 6), and in favor of the cities of Covington and Louisville (notes 10 and 11) for certain causes of action, all of which were sustained against the objection of being "exclusive privileges." The first named act and an amendment thereto are construed in *Mortimer v. L. & N. R. R. Co.*, 10 Bush, 485. See *contra*, Section 16, n. 4, as to extension of time on fee bills.

³⁶ Ch. 71, Art. IV, Sec. 1. It seems that the filing of a creditor's claim in a suit for settling a decedent's estate is the beginning of an action. (*Biggs v. L. & B. S. R. R. Co.*, 79 Ky. 470.)

³⁷ *Dudley v. Price's adm'r*, 10 B. M. 84, 88.

³⁸ *Board v. Jolly*, 5 Bush, 86.

³⁹ *Gough's adm'r v. Alvey* (Superior Court), 10 Ky. Law Rep. 590.

⁴⁰ *Chiles v. Drake*, 2 Metc. 146; *Rankin v. Turney*, 2 Bush, 555.

⁴¹ *L. & N. R. R. Co. v. Com'w'lth*, 1 Bush, 250, 261. But see act of 1890 authorizing suits for taxes in Supplement to Section 38.

⁴² *Strauss v. Com'w'lth*, 1 Duv. 149.

⁴³ *Auditor v. Halbert*, 78 Ky. 577.

⁴⁴ *Board of Trustees v. The Auditor*, 80 Ky. 336. The proceeding by mandamus against the Auditor is

SEC. 186. DISABILITIES AND OTHER MODIFICATIONS.

Where an action accrues to an infant, married woman, or person of unsound mind, which is barred by the *third* article of the Chapter on Limitations, the length of the bar is allowed, after the removal of all disabilities existing when the action accrued, or after the death (whichever happens first) of the party under disability.¹ This rule may vastly extend the time during which an administrator remains bound to a female distributee, but does not affect the sureties on the bond; for the limitation in favor of sureties is given by article *six*.²

But where the saving applies, an infant need not await his coming of age, but may sue at any time during infancy.³ Where a person of unsound mind, found such by an inquest, has a lucid interval lasting so long that he may look into the state of his business and bring the action, the statute begins to run against him, and is not stopped by the return of the malady.⁴ Where life is lost by the "willful neglect" of any person or corporation, an action is given to "the widow, heir, or personal representative" of the decedent.⁵ As only one such action can be brought, the cause of action itself is barred in one year, whenever there is a widow or representative of full age; and the heir, though an infant, can not bring his suit thereafter.⁶

The "statute" having begun to run, its course will be interrupted in the following cases :

1. Where the party entitled to bring an action dies, his representative may bring the action within one year from and

here treated as a mode of suing the State, provided by the legislature under Constitution, Art. VIII, Sec. 6 (see *supra*, Sec. 20). The reasoning under this head is incompatible with the preceding case.

¹ Gen. Stat., Ch. 74, Art. IV, Secs. 2, 14, 15.

² *Priest v. Warren*, 7 Bush, 633. Bar in favor of surety runs from coming of age of distributee, but not from her discoveriture.

³ *Hopkins v. Virgin*, 11 Bush, 677.

Nor is the seven years' limitation in favor of a fully settled decedent's estate affected by disabilities. (Art. IV, Secs. 6, 7.)

⁴ *Clark's ex'r v. Frail's adm'r*, 1 Metc. 35 (a case of detainee, which belonged in Section 112, *supra*; but it was thought best to treat of disabilities in all personal actions in one place.)

⁵ Gen. Stat., Ch. 57, Sec. 8.

⁶ *L. & N. R. R. Co. v. Sanders*, 86 Ky. 259.

after the time at which he qualifies as such, but the interval between such death and qualification must not add more than three years to the length of the bar.⁷

2. The time during which the plaintiff is an alien enemy, or is confined in the penitentiary, is not to be counted.⁸

3. And most important: "When a cause (within) the *third* article . . . accrues against a *resident* of this State, and he by departing therefrom, or by absconding or concealing himself, or by any other indirect means obstructs the prosecution of the action, the time of" such absence or obstruction shall not be counted in his favor, and will only run again when he becomes a resident of Kentucky "in good faith," and after notice to the party in interest.⁹

Here again sureties are put under a somewhat different rule, to be stated hereafter. It is plain that the debtor's absence should be taken out when it begins after the demand has matured; but under a former statute, with similar language, it was deducted, though the defendant had left the State before such maturity.¹⁰ A temporary absence, without either change of residence or concealment, such as was brought about by a pleasure trip or by service in the volunteer army of the United States, does not interrupt the running of the statute.¹¹

Where a debtor obstinately fights a suit, and thus keeps a judgment against himself off till it is too late for the creditor to bring a suit in equity after a return of No Property, to set aside a fraudulent conveyance, it is not such an "obstruction" as will meet the plea of limitation in the latter suit.¹² A curious case arose in which the meaning of "obstructing" the suit was tested. A resident of Alabama, being indebted to the

⁷ Gen. Stat., Ch. 71, Art. IV, Secs. 8 and 4.

⁸ *Ibid.*, Secs. 11, 13.

⁹ *Ibid.*, Secs. 9 and 10. Sec. 10 is to be understood as limiting Sec. 9, *i. e.*, the bar does not run again upon a return to the State, unless the return be permanent and notorious, confirming what was held in *Ridgely v. Price*, 16 B. M. 409; for, construed by itself,

Sec. 10 would make too radical a change in the law. (*O'Bannon v. O'Bannon*, 13 Bush, 583.)

¹⁰ *Poston v. Smith's ex'r*, 8 Bush, 589; *Bennett v. Devlin*, 17 B. M. 353, 362.

¹¹ *Ormsby v. Letcher*, 3 Bibb, 269; *Buckley v. Jenkins*, 10 Bush, 21.

¹² *Phillips v. Shipp*, 81 Ky. 486.

plaintiff and others, turned his estate into money, fled the country, and eight years thereafter settled in Kentucky under an *assumed name*. The plaintiff never made any effort to sue him after he had come to Kentucky, not having the least idea where he was; but he found and sued the executor of his will after a lapse of over thirty years. The exclusion of the intermediate time might have been refused because the decedent was not within the words of the proviso, not being a resident of Kentucky when the cause of action accrued; but it was refused on the ground that there was no *obstruction*.¹³

4. The time during which the bringing of an action is stayed by injunction, or while any step toward bringing the action is suspended "by injunction, other lawful restraint, vacancy in office, absence of an officer, or his refusal to act," shall be excluded from the count.¹⁴ But the common enjoining order in a suit to wind up the estate of a decedent does not stop the running of the bar, for it leaves each creditor at liberty to present his claim in the settlement suit, which is the most effective way to prosecute it.¹⁵

5. Where "an action"¹⁶ is begun in time, and is *after defense* dismissed for want of jurisdiction, the plaintiff or his representative may begin a new action in the proper court within three months from such dismissal.

The maxim, that limitation being an incident to the remedy must be governed by the *lex fori*, has been departed from by the statute itself, in directing:

1. That when a judgment rendered in another State or country (except in favor of a resident of Kentucky "who has had the cause of action from the time it accrued") is under the *lex loci* barred by lapse of time, no action can be brought upon it here.¹⁷ Where the judgment in another State had been "revived" more than fifteen years after its rendition, in order to restore its lien, the limitation of fifteen years under

¹³ McDonald's ex'r v. Underhill's ex'r, 10 Bush, 584; perhaps Bennett v. Devlin, *supra*, cut off the other ground of decision.

¹⁴ Ch. 71, Art. IV, Secs. 12 and 21.

¹⁵ Biggs v. L. & B. S. R. R. Co., 79

Ky. 470, 478.

¹⁶ This seems to apply to actions for land and against sureties, etc., and not to actions under Art. III alone.

¹⁷ *Ibid.*, Sec. 18.

the law of Kentucky counts from the original judgment, not from the order of revivor, and no action can be brought here on the judgment, for the statute recognizes the foreign limitation only when it is shorter than our own.¹⁸

2. A cause of action arising in another State or country between residents thereof, or between them and "residents of another State or country," is barred by the *lex loci*, if its limitation is shorter than our own.¹⁹ The words "residents of another State or country" do not embrace residents of Kentucky; but whenever either the obligee or the obligor is a resident of Kentucky our law applies.²⁰ And where a note is made in California, between two Californians, and the maker takes up his residence in Kentucky before the note matures, the cause of action "arises" in Kentucky, or at least against a resident of Kentucky, and he can not plead the California limitation.²¹

The extension of time in which sureties may be sued, beyond the length of the ordinary bar, rests on a section of the law²² which has, through Chapter 97 of the Revised Statutes, come down from an act passed in 1838 in favor of sureties. There shall not be counted "the time elapsed when there was no executor, etc., authorized to commence an action, nor the six months during which an action can not be brought against a personal representative; nor any delay assented to by the surety *in writing*." On an arrest or reversal of judgment for plaintiff, he has one year more in which to sue. "And if such surety shall abscond, conceal himself, or by removal from the State, or otherwise obstruct or hinder his being sued," the time so lost is not to be counted; so also if "such judgment be obstructed by appeal, supersedeas, or injunction."

The court professedly, on a slight difference in the wording between the act of 1838 and the Revised Statutes, held at first that a request of the surety for forbearance was not an ob-

¹⁸ *McArthur v. Goddin*, 12 Bush, 274.

¹⁹ Ch. 71, Art. IV, Sec. 19.

²⁰ *Labatt v. Smith*, 83 Ky. 599, and *Templeton v. Sharp*, 10 Ky. Law

Rep. 499, overruling *Allen v. Hill*, 78 Ky. 119.

²¹ *Templeton v. Sharp*, *supra*.

²² Gen. Stat., Ch. 71, Art. VI, Sec. 5.

struction,²³ and then that it was.²⁴ But the court in a third case rightly came to the conclusion, that, by giving effect to a request in writing, the law-maker showed a clear intention that an unwritten request should not have the effect of extending the time for action.²⁵ Yet a fourth case arose in which the surety by promising to confess judgment induced the plaintiff not to issue process on a petition already filed, and then plumply refused to confess judgment when the seven years and seven days over had expired. It was very hard on the creditor; there was evident bad faith, and the Court of Appeals, with human weakness, removed the bandage from the eyes of Justice and held that in such a hard case as this the action of the surety was an "obstruction and hinderance."²⁶

The time in which to sue the heir upon the ancestor's note or bond, which is fifteen years,²⁷ can not be extended by an intermediate suit against the personal representative which turns out fruitless for want of personal assets.²⁸

SEC. 187. NEW PROMISE AND PARTIAL PAYMENT. As early as 1808 the Court of Appeals of Kentucky rejected the course of decisions by which Lord Mansfield and other English judges had frittered away their statute of limitations. Instead of letting "the slightest acknowledgment take the case out of the statute," there must be, in the words of the Chief Justice, "an express acknowledgment of the debt as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must . . . have been made within the time prescribed."¹ In that case the debtor had acknowledged "that he had once owed the plaintiff, but he sup-

²³ Coleman v. Walker, 3 Metc. 65.

²⁴ Walker v. Sayres, 5 Bush, 579. There were letters by the surety in the case, but the decision is not rested solely on the request in writing.

²⁵ Kennedy v. Foster's ex'r, 14 Bush, 479.

²⁶ Newton v. Carson, 80 Ky. 309.

²⁷ Trustees of Kentucky F.O. School v. Fleming, 10 Bush, 234.

²⁸ Hopkins v. Stout, 6 Bush, 375, 377.

¹ Bell v. Rowland's adm'r, Hardin, 301. The writing of the opinion is in Harrison v. Handley, *infra*, ascribed to Judge Trimble. It is the foundation of the American doctrine, being approved by the Supreme Court of the U. S. in the Kentucky case of Bell v. Morrison, 1 Peters, 351; and the doctrine thus established is quoted from Angell on Limitations in late Kentucky cases.

posed his brother had paid it in Virginia, and if his brother had not paid it, he owed it yet." It was held that he did not by this admission take upon himself the burden of proving the payment by his brother, and that there was no evidence of a new promise to go to the jury.²

This rule was in 1831 criticised as being yet too favorable to the creditor. "After the debt has been barred by time, the debtor can prevent a judgment against him. . . . *The contract* is then dead. *The debt*, so far as it was merely legal, is extinguished. . . . If there can be any recovery therefor, it must be on a new contract exclusively," arguing that such a contract should not be implied from a mere admission; however, winding up: "But the rule in *Hardin* (meaning the case quoted above) is too firmly fixed to be now disturbed. . . . None but an express acknowledgment, from which it may be reasonably inferred that the party making it intends to pay the debt, will be sufficient."³

Hence a sworn answer acknowledging the debt, while insisting on the bar of the statute,⁴ or even an admission of the debt, coupled with an offer to pay it in kind, but not in currency, can not revive the demand,⁵ nor even an admission that, after striking off certain items, "the account was all right," for that might mean simply that such an amount was due at one time without excluding subsequent defenses.⁶

In the earliest Kentucky case on the subject, a bequest in a will of personalty to pay the testator's just debts, "notwithstanding any law now existing to the contrary thereof," was held, upon precedent, not to amount to a new promise nor to

² Disapproving the case of *Lloyd v. Maund*, in the K. B., 2 Term Reports, where three of the judges granted a new trial, because a letter, a sentence of which might be twisted into an admission, was not left to the jury to find a new promise in.

³ *Head's ex'r v. Manners' adm'r*, 5 J. J. Mar. 255, 260. The acknowledgment was by an *executrix*, and it was doubted whether a personal representative can in any case revive a

demand by an acknowledgment, and it was said that the distributees could compel him to plead the statute. The words proved were: "the work was done and" either "it shall be paid for"—or "it ought to be paid for"—the witness was uncertain which; the former words would have been sufficient, the latter not.

⁴ *Gray v. McDowell*, 6 Bush, 475.

⁵ *Warren v. Perry*, 5 Bush, 447.

⁶ *Harrison v. Handley*, 1 Bibb, 448.

a trust, though a similar devise of lands would have the effect.⁷ It must, however, be competent for a testator to leave a part of his estate, whether real or personal, in general words to those to whom he owes debts, barred by limitation, and this was done effectually in a case which has been already quoted for another purpose.⁸

A mortgage for an antecedent debt not containing a covenant of payment is an acknowledgment, and will hold the claim good for five years, but not for fifteen years.⁹

Where a new promise is made after the original debt is barred by time, the new action must be based upon the new promise, the original debt serving only as a consideration for such promise. This was so ruled in 1826, and has been adhered to ever since.¹⁰ A promise by one of two administrators was in that case deemed sufficient to bind both.

As the new promise is the basis of the new action, it must be made to the creditor or to his agent; words, no matter how explicit, spoken to a stranger, can not amount to a contract, and can therefore not revive a debt.¹¹ In a short opinion

⁷ Campbell v. Sullivan, Hardin, 17. A mere recital in the will, that the testatrix had given a certain note, does not revive it; see *infra*, Carr's ex'r v. Robinson.

⁸ McDonald v. Underhill, 10 Bush, 584; the debts were by the will to be paid without interest, and it was so decreed.

⁹ Prewitt v. Wortham, 79 Ky. 287; it was a chattel mortgage. Suit brought in thirteen years after its execution was said to come too late by eight years (p. 291). Messrs. B. and F. in their notes to the Gen. Stat. have collected all the cases of insufficient acknowledgments; those passed upon in Ormsby v. Letcher, 3 Bibb, 269, Tillet v. Lindsey, 6 J. J. Mar. 837, are weaker than those condemned as insufficient in the text. In French v. Frazier, 7 J. J. Mar. 425, a suit against an agent for money

collected, his acknowledgment that he had collected a great sum was accompanied by claims for credits, and therefore insufficient. Where the promise is limited, say an account is acknowledged, "and may be taken out of the interest on a bond held by the debtor," it can be enforced only to that extent. (Gray v. Lawridge, 2 Bibb, 285.) See for a sufficient "acknowledgment," Ditto v. Ditto, 4 Dana, 502; the account was admitted to be "just," and though the defendant complained of prices being a little too high, a promise was implied.

¹⁰ Hord's adm'r v. Lee, 4 Mon. 36; followed in 1873 in next quoted cases.

¹¹ Trousdale's adm'r v. Anderson, 9 Bush, 276. As an obligation barred by time is still binding morally, money paid under it by mistake of law, that is, through ignorance of the bar of limitation, can not be re-

Judge Robertson enforced the debtor's promise to pay an account barred by time "as soon as able," without any showing that the debtor was able to pay it; arguing that an execution would test his ability.¹² This is in accord with the old English precedents, but wholly irreconcilable with the Kentucky doctrine of a new contract, on which the action must be based.

Before 1852 specialties were not subject to any limitation, but only to the presumption of payment arising after a lapse of twenty years. Hence any recognition of the debt within the twenty years, by paying the interest or part of the principal, or by written or spoken words, might be shown to defeat this presumption. The limitation of fifteen years put upon all written obligations by the Revised Statutes compelled the court to look at the subject from a new standpoint. The question came up in a suit brought in 1866 against the heirs of the maker of a note, which fell due in 1849, and on which a credit of \$23, dated in 1852, had been indorsed by the payee. The good faith of the indorsement was shown by its having been on the note as early as 1860, long before the limitation had run; but there was no other proof that the sum was paid at that time. It was agreed that an express acknowledgment of the debt, at a time when it had not been barred, would strike out the time between its maturity and such acknowledgment from the statutory period, and the majority of the court thought that the credit on the back of the note was sufficient proof, both of the payment and of the resulting acknowledgment of the residue as a subsisting debt. On the latter point Judge Hardin dissented in an able opinion, well sustained by the Kentucky precedents. Less than fifteen years having elapsed from the date of the credit before suit brought, a judgment against the heirs was sustained.¹³

The doctrine was reaffirmed three years later, Judge Hardin

covered back; this is said in *Hubbard v. City of Hickman*, 4 Bush, 204, though the point does not seem to have arisen in the case.

¹² *Cecil v. Welch*, 2 Bush, 168.

¹³ *Hopkins v. Stout*, 6 Bush, 375.

But where the debtor's widow makes

a part payment voluntarily, and out of her own means, before the expiration of the statutory bar, she does not thereby keep the debt alive. (*Gallagher v. Whalen*, 10 Ky. Law Rep. 458.)

still dissenting. The suit was brought in February, 1867, by the administrator of the surviving payee of a note, dated and due in 1846, for over a thousand dollars, on which several credits were indorsed, the last of them signed by the payee, showing the payment of \$75 "by the hands of Dr. Geoghegan." The fact of payment was not controverted by answer. Although the holder and maker of the note did not meet personally at the time of payment, the majority of the court held that there was *prima facie* evidence of an acknowledgment of the balance apparently due, and a judgment of the Circuit Court for the defendant was reversed.¹⁴ But where the maker denies that a payment was made, which is indorsed upon a note, under a date within fifteen years, the burden rests on the holder to prove that there was a payment made at the time.¹⁵

There is one precedent on this subject left to consider. In 1884 the testatrix had given her note for a subscription to an incorporated charity, payable January 1, 1845, and the note was indorsed: "If not paid, I request indulgence." She recognized the note from time to time, the last date that could be proved being in August, 1860, more than fifteen years after the note fell due. The suit was brought after 1865, not on the new promise, but on the note itself, and a plea of the statute was sustained. The request for indulgence could not be considered, being made before the note became due. It was said, that if there had been a promise or express acknowledgment while the note was alive, the original cause of action would have remained good for fifteen years thereafter, just as it would after an acknowledgment by part payment.¹⁶

¹⁴ English v. Wathen, 9 Bush, 387. Judge Hardin, though still dissatisfied with Hopkins v. Stout, admitted that the case before the court came within the authority of that decision.

¹⁵ Frazer's adm'r v. Frazer, 13 Bush, 397. Whether proof that the entry against the holder's interest was made

at the time of its date would have been sufficient is left undetermined. There was no proof on the subject.

¹⁶ Carr's ex'r v. Robinson, 8 Bush, 269. The promise was unavailable as the ground of a new action, being unwritten and therefore barred by the limitation of five years.

SUPPLEMENT.

NOTE.—The foregoing pages of this work passed through the press during the first seven months of the year 1890. In the mean time the General Assembly sat and enacted a few laws of general interest falling within the scope of this work. Decisions were also rendered by the Court of Appeals on subjects, the treatment of which was already in print. Thus a supplement, bringing the law down to the date of publication, seemed useful if not needful, and the author thought best to include in it some points and references which, during the progress of the work, had been omitted or overlooked. This supplement follows the sections of the book; each part thereof is numbered as the section with which it is to be read, and the number of the reference and note indicates a place of the section having the like number for reference and note.

(1). Since the Prefatory Remarks were printed two more “common law States” have been admitted into the Union.

(3, *sub fine*). An act was approved May 3, 1890, calling a convention to give us a new Constitution. Its work is to be submitted to the people; a majority of those voting will be sufficient to ratify it.⁹

(5, *sub fine*). Carroll’s edition of the Codes of Practice, Civil and Criminal, including the amendments contained therein, has been adopted “as the laws (*sic*) of the land”; but with the proviso of not repealing “any act heretofore adopting any other Code.”⁷

An act which “takes effect from and after its passage” is in force during the whole day, the time of approval not being noticed.⁸ When “from and after” a named day, it takes effect on the next day.⁹

(8). The stockholders in a chartered academy turned its property over to a college, incorporated at the same time, with an implied understanding that the college would be established and remain at the same town; and it was located there by its charter. An amendatory act passed in the following year gave to the college corporation the power to remove the college to another place, within a named boundary. It

(3). ⁹Session Acts, 1889–90, Ch. 1287, p. 124.

(5). ⁷*Ibid.*, Ch. 217, p. 20.

⁸Mallory v. Hiles, 4 Met. 54.

⁹McNeil v. Commonwealth, 12 Bush, 730.

was held that the understanding on which the academy and its stockholders dealt was not such a contract as the Constitution protects against legislative control.^{8*}

(10). But a contesting board may reject the successful candidate as not eligible on such grounds as want of residence, which do not involve an offense.^{5*}

(22, *sub fine*). A clause in the General Statutes (Chapter 42, Section 9, subsection 3) compelling the non-resident owner of a ferry to sell it, under pain of forfeiture, was held void, as far as it affected a ferry right held at the time of its enactment by a non-resident, the court not naming the part of the Constitution with which it conflicts.⁷

(24, *sub fine*). One very late case of criminal libel is reported, but the opinion passes only on questions of practice.¹⁵

7. *No person shall for the same offense be twice put in jeopardy of life and limb.* (Bill of Rights, Section 14.) This does not prevent the punishment of a statutory misdemeanor, not made infamous, both by indictment and by an action for a penalty, as is done by the statute against betting on elections.¹⁶

(30). Where the holding of one office disqualifies for, or vacates another office, a deputyship in the former office will have the like effect.^{15*}

(34). This principle of allowing only the party prejudiced to complain of a breach of the Constitution was much shaken in 1885, in passing upon an act of 1874 raising a tax on negroes to pay for common schools. The law being held unconstitutional, under the guarantees of the Fourteenth Amendment to the colored citizen, the inference was drawn that the collection by the sheriff was unauthorized, and upon his default in paying it into the treasury his sureties in the revenue bond were not liable.^{4*}

(8). ^{8*}Bryan v. Board of Education, 12 Ky. L. R. 12.

(10). ^{5*}Grimstead v. Scott, 82 Ky. 88.

(22). ⁷Dufour v. Stacey, Court of Appeals, June 19, 1890 (still subject to rehearing).

(24). ¹⁵Tracy v. Commonwealth, 87 Ky. 578. The court speaks inadvertently of the constitutional right

to *plead* the truth of the libellous matter. The defense can be made under the plea of not guilty; see Code of Practice in Cr. C., Sec. 172, and see Bill of Rights, Sec. 10.

¹⁶See Section 180, n. 15. (NOTE.)

(80). ^{15*}Wilson v. King, 8 Litt. 457, 459.

(84). ^{4*}Dawson v. Lee, 83 Ky. 49, 55.

(35). But, like suburban lands, a bridge laid from a city upon the Ohio River across that river as far as low-water mark on the other side, if included within the chartered limits, may be taxed as a part of the school district, or railroad tax district, which such city constitutes.^{6*}

(37). The long withheld opinion has at last (June 1890) been brought out. The power to value property for taxation is declared to be *ministerial*; hence the law-makers can not adopt a void assessment, as they can not, under the divisions of powers, encroach on the duties of ministerial officers.^{8*}

(38). The rate of 47 cents named in the "Hewitt Law" is reduced to 42 cents (or 42½ including the A. and M. College tax) in time for the tax bills of 1890 on the assessment of September 15, 1889.^{1*}

The franchises of corporations, other than banks, railroad and turnpike corporations, are to be taxed at their fair value for taxation.^{6*}

The board of supervisors for the county must cause a personal notice to be given to a tax-payer before proceeding to raise his assessment.^{7*}

The Commonwealth may bring suit for taxes which can not be collected "by the ordinary methods of distraint and sale" within five years after the assessment is made, or might have been made.^{12*}

(*Sub fine*). A law of 1888, not heretofore mentioned,¹⁸ amended in 1890,¹⁹ governs the State Board of Equalization. As the law now stands, the board meets at the State Capital on the tenth of February in each year; it receives tabulated

(35). ^{6*}Henderson Bridge Co. v. City of Henderson, Court of Appeals, June 21, 1890; not yet published in Ky. L. R., being still under petition for rehearing.

(37). ^{8*}Slaughter v. City of Louisville, 12 Ky. L. R., p. 61.

(38). ^{1*}Session Acts, 1889-90, Ch. 1805, p. 158.

^{6*}*Ibid.*, Ch. 317, p. 29.

^{7*}*Ibid.*, Ch. 557, p. 52.

^{12*}*Ibid.*, Ch. 1763, p. 149.

¹⁸Appendix to B. and F. G. St., p. 101.

¹⁹Session Acts, 1889-90, Chapter 1903 p. 170. The duties imposed on the county judge and county attorney will turn out, in the most populous counties, to be too burdensome to be performed.

statements from the assessment books of each county ; it then aims to bring the assessed value of " farm lands " and of " town lots " in each county to the ratio of seventy per cent of the cash value, keeping the two classes of land separate ; the cash value is to be obtained mainly from a report of the county judge and county attorney in each county on the conveyances made for twelve months before the 15th of September preceding ; and a uniform percentage is to be added to, or subtracted from, each class of lands to attain the result ; and the same percentage is to be applied to personalty as to farm lands. The results reached by the board are certified to the several counties, and are extended upon their assessment books.

The exemption of " the real estate and investments devoted to public schools, seminaries, etc.," by Chapter 92, Article I, Section 3, of the General Statutes, from State tax does not protect the grounds, buildings, or other property of a private school which is conducted for the benefit of the owner, though it be incorporated.²⁰ The corresponding passage of the present revenue law puts this view beyond doubt.²¹

(40). The Commonwealth may bring actions for the benefit of a county, which levies an *ad valorem* tax, to recover the amount due to such county for the tax on distilled spirits.^{2*}

The proportion of railroad property within any " graded or common school district," other than a " colored school district," is chargeable with the local school tax levied by the district.^{14*}

(41). Two decisions were rendered very lately further defining the mode of apportioning the cost of street work in Louisville.^{1*}

²⁰ *City of Henderson v. McCullough*, 12 Ky. L. R. 77.

²¹ *B. and F. G. St.*, p. 1036.

(40). ^{2*}*Ibid.*, Ch. 1881, p. 168.

¹⁴*Ibid.*, Ch. 518, p. 49.

(41). ^{1*}*Stengel v. Preston*, 14 S. W. Rep'r, p. 839, " to be reported," provides a way of apportioning the cost on both sides of a street which bounds

with one side a triangular " square," *i. e.*, area surrounded by principal streets: *Cooper v. Nevin* (S. W. R. 841), 11 Ky. L. R. 875, requires the council to treat as separate squares an area too large for one square, and which within the natural course of things will be cut up into squares on lines already indicated.

(42, *sub fine*). It was said, rather quaintly, that a tax-payer in a city, who as councilman had helped to impose a tax of doubtful legality, and as tax collector had collected it of others, should not be allowed to sue the city to recover it on the ground of his mistake of law.¹⁴

(43, *sub fine*). Where a city has contracted with any person or corporation (*e. g.* with a bridge company as to the price of tickets for crossing the bridge) it can not, by an ordinance imposing penalties, force upon the other party its own construction of the contract, and will be enjoined from annoying that party by attempts to inflict such penalties.¹⁰

(45, *sub fine*). An act of 1865, making cities in some cases responsible for the destruction of property by mobs, is embodied in the General Statutes.¹⁰

(49, *sub 2*). See Section 155; an indemnifying bond does not shield the officer for wrongfully levying an *attachment*.

(50). Where the county judge allowed a guardian to write the signature of his alleged surety to the guardian's bond, and the former defaulted, while the latter disowned the signature, the judge was held liable.^{5*}

(51). Another island in the Ohio River, known as Green River Island, was, in 1890, adjudged to Kentucky, settling, probably, its last boundary dispute.^{9*}

(59). A *dictum* in a late case ("not to be reported") refers to an unrecorded deed as not being a conveyance and no better than a title bond. These words caused surprise, and will hardly be drawn into precedent.^{3*}

(61). It should be said in the text that in deeds made under the General Statutes the clerk's certificate is conclusive, in the absence of fraud, as to the privy examination of a married woman.^{6*}

(42). ¹⁴ Hubbard v. City of Hickman, 4 Bush, 204.

(43). ¹⁰Newport v. Newport Bridge Co., 12 Ky. L. R. 59.

(45). ¹⁰Chapter 1, Section 5.

(50). ^{5*}Commonwealth v. Netherland's adm'r, 87 Ky. 195.

(51). ⁹Indiana v. Kentucky, Sup. Court, May, 1890.

(59). ^{3*}Lucy v. Hopkins, 11 Ky. L. R. 907.

(61). ^{6*}Dowell v. Mitchell, 82 Ky. 47.

The deed of a married woman on which the time for recording had expired before the General Statutes came into effect was then void, and could not be revived by recording it thereafter.^{15*}

(65). Even should the "administrator with the will annexed" have been qualified with a defective bond, so as not to secure the devisees in the proceeds of a sale made by him under the powers given by the will, his character is established by the order of the County Court, and a sale made by him passes the title.^{6*}

(68). A judgment rendered against an infant property summoned, but for whom no guardian *ad litem* was appointed, was held not to be void under the Code of 1854.^{20*}

(72). It was held, in accordance with the practice of the English Chancery, by Judge Robertson, in 1866, that a court of equity should not order a sale of land "when the title is so questionable as to prevent a sale for a fair price."^{3*} The rule has not always been followed.

(76).. The question whether a court of equity has power to sell a lot as indivisible, under Section 490, subsec. 2 of the Code, when all the plaintiffs and defendants are infants, has never been decided. The writer inclines against such jurisdiction.

Where, of several part owners of a lot, one devises or grants his land so that his undivided share is held in life estate with remainders over, this does not prevent the owners in possession from insisting, under Section 490, subs. 2, of the Code, that the lot, if not divisible in kind, be sold for the purpose of dividing the proceeds of sale.^{3*}

(77, *sub fine*). A court of equity in Kentucky has, in view of the provisions of the Code of Practice, no longer the power to adjudge the payment of money for owelty of partition from one part owner to another, though this "practice would now be tolerated," if the parties could be made even out of a com-

^{15*}Butler v. Wheeler, *Ibid.*, 475.

25, 36.

(65). ^{6*}Johnson's ex'r v. Mobberly.

(72). ^{3*}Skillman v. Hamilton, 1

(68). ^{20*}Pond v. Doneghy, 18 B. M.

Bush, 248.

558. Simmons v. McKay, 5 Bush,

(76). ^{3*}Kean v. Tilford, 81 Ky 600.

mon fund. Otherwise, the only alternative lies between a partition in kind and a sale of the land as indivisible.¹⁷

(78). A judgment rendered in one of several consolidated causes is binding on every party to each of the actions.^{18*}

As the County Court is in probate matters a court of "exclusive and general jurisdiction," the burden of showing want of jurisdiction always rests on the party claiming against the probate, even where the opposite party seems by pleading affirmatively to undertake the burden.⁴

(80. *sub fine*). Under an act of May 27, 1890, an executory contract for land may be recorded in the deed-book of the county containing the land, and lodging it for record is notice to all the world.¹⁶

(86, I). Where a deed is made at the husband's instance, and in consideration of his money, to the wife and *her* children it is construed as if made by him. In such a case it was held that "an intention should be presumed on his part to give the whole of it to her for life, remainder to the children, unless a contrary purpose appears from the terms of the provision or circumstances attending it." But, "where a father conveys to his child and that child's children, they are regarded as taking jointly."^{9*}

Where the mother, though she be the devisor's widow, is appointed by the will guardian of the children, and is given "control" of the property, it follows "irresistibly" that the children are to have an immediate interest.^{9†}

(86, II). Where a devise is to go over for want of *children*, the word must be meant to include grandchildren.^{11*}

(90). Where the landlord, within the ninety days after the expiry of a lease, sees the tenant incur a heavy expenditure with a view to an occupancy for another year, and he stands by without warning him, accepting rent for two months, he is estopped from demanding possession thereafter.^{3*}

(77). ¹⁷Wren v. Gibson, 12 Ky. L. L. R. 27.
R. 26.

^{9†}Courton v. Porter, 7 Ky. L.

(78). ^{18*}Seiler v. Northern Bank of R. 96.
Kentucky, 86 Ky. 128.

(86, II). ^{11*}Miller v. Carlisle, 12

⁴Master's ex'r v. Bienker, 87 Ky. 1. Ky. L. R. 68.

(80). ¹⁶Sess. Acts, 1889-90, p. 173.

(90). ^{3*}Irvine v. Scott, 8 Ky. L. R.

(86, I). ^{9*}Smith v. Upton, 12 Ky. 911.

(92). One claiming remotely under an unrecorded deed, in which a lien is reserved, can not resist such lien for want of notice. He must take notice of the deeds through which he derives title.^{1*}

A vendor's lien does not extend to fixtures (such as machinery for manufacturing) which the vendee puts into a building, unless there be a clear intention of making them permanently a part of the freehold.^{19*}

(93). "The doctrine is well settled that a conveyance absolute in form may be shown by *parol evidence* to be but an equitable mortgage. In fact, courts lean to this conclusion in doubtful cases." This was said *arguendo*, the fact having been held to the contrary on a former appeal. Still, the solemn declaration of the court should have its weight.^{18*}

The case, which in the body of the section is referred to as a manuscript opinion, is officially reported.^{12*}

(94). Among the acts of 1887-88 there is published one purporting "to create a lien on canals, railroads, and other public improvements," for labor and materials in constructing or improving them; but the subjoined certificate of the Secretary of State leaves it in doubt whether the bill had become a law by expiration of the time within which the Governor might veto it, or whether it had been vetoed in time. It was not passed over the Governor's veto. The lien under this act, if in force, is enforceable only if a statement of the amount due for labor is filed in the county clerk's office within sixty days after the last day of the last month in which labor, materials or *teams* were furnished, and rests on all the property and franchises of the canal, railroad, or turnpike company as a unit.^{4*}

(95). The return of "no property" on an execution from a Quarterly Court does not support a creditor's suit in the Circuit Court on which land may be attached. There should be

(92). ^{1*}Lucy v. Hopkins, 11 Ky. L. R. 907.

^{19*}Clore v. Lambert, 78 Ky. 224.

(93). ^{18*}Seiler v. Northern Bank, 86 Ky. 128 (referring to the decision

on a former appeal in Northern Bank v. Deckebach, 88 Ky. 154).

^{12*}Harris v. Bannon, 78 Ky. 568.

(94). ^{4*}Appendix to B. & F. G. St., Ch. 70, p. 88 of Session Acts, '87-'88.

first a transcript to the clerk's office of the Circuit Court, a new execution under Section 723 of the Code, and a return of "no property" on that.^{4*}

A return of "no property" made by the coroner on an execution issued to the sheriff is void, and will not support a creditor's suit.^{4†}

The lien arising from a decree to sell a parcel of land for the satisfaction of the plaintiff's demand is not lost by delay in carrying it into effect for a time short of the period of limitation, though the papers in the case may have been "filed away" by order of the court. The judgment is a public record, and notice to all the world.^{14*}

(*Sub fine*). In a creditor's suit against the owner or owners of a railroad, the plaintiff is now by express law entitled to have a receiver appointed to take charge of the road, without prejudice to any other means he may have for the enforcement of his judgment.¹⁷

(99). In like manner, where by fraud or mistake, A. allows his estate in land to pass to B., he has not his fifteen years in which to recover it back, but is bound by the five and ten years' limitation for "fraud and mistake."^{9*}

(102). The decision of the Supreme Court here spoken of, having been omitted at its proper place, is here subjoined.^{5*}

(103). A *dictum* of Judge Robertson as to color of title must here be mentioned. After holding that a "void" patent does not protect the settler under the seven years' limitation law (see next section), he intimates that even if there had been a twenty years' possession, such a patent would have been of no avail. As a void deed between man and man gives color of title, and as a patent, even if void, presupposes a survey and the marking of boundaries, this *dictum* can not be sustained as

(95). ^{4*}Behan v. Warfield, 11 Ky. L. R. 960. The point was lost to the defendants, who in the court below defended on the merits; see this section, n. 7.

^{4†}Johnson v. Elkins, 11 Ky. L. R. 967.

^{14*}Pittman v. Wakefield, 11 L. R.

972.

¹⁷Session Acts, 1889-90, Ch. 1039, p. 109.

(99). ^{9*}Salve v. Ewing, 1 Duv. 271; Wood v. James, 87 Ky. 511.

(102). ^{5*}Ewing v. Burnett, 11 Peters, 41.

in accord with other authorities.^{2*} The extension of possession to a marked boundary has been acknowledged as law in a recent case.^{2†}

Where the senior grantee, through a lease of the whole tract to a tenant, who has an inclosure *outside* of the interference, or who, by some equally open and notorious act based on such inclosure, takes possession of the whole tract with the purpose of protecting the title to all of it, it is said that one holding under the junior grant can not, by settling *afterward* within the interference, gain a possession outside of his own inclosure.^{1**}

(105, 113, and 117). The power of an executor or administrator to sell "dividend-paying stocks, bonds or other security, which the decedent owned at his death," is abridged by a late statute. He must now, before selling such effects, apply for leave to the court of equity of the county in which he qualified; but the order may be made by the judge in vacation.^{2*}

The Sections (113 and 117) as to the transfer of choses in action and of corporate stocks are also affected by this act, which goes on to protect purchasers, and the corporation which carries out the transfer of the stock, from responsibility, should the proceeds of sale be misapplied; a provision seemingly unnecessary.

(109). Where personal property comes to a married woman as a distributive share, and is, with her husband's consent, invested in bank stock, in his name as trustee for her, an intention to raise a separate estate is manifested. A married woman can not, "as to corporate stock, execute the ordinary power of attorney, under which shares are transferred, any more than any other power of attorney." A bank which buys in such stock from a transferee holding such a power takes it with notice, and subject to the married woman's claims.^{8*}

(103). ^{2*}McMillan's heirs v. Hutcherson, 4 Bush, 611, 615. The void grant was barely seven years old.

^{2†}Farmer v. Lyons, 87 Ky. 421.

^{1**}Simon v. Gouge, 12 B. M. 156. The possession under the junior grant in this case was not twenty years

old. It was rather a question of such possession as will sustain an action of trespass.

(105). ^{2*}Session Acts, '89-'90, Ch. 1096, Sec. 2, p. 116.

(109). ^{8*}Bank of Louisville v. Gray, 84 Ky. 565.

By an act of 1890 the employer of a married woman shall pay her wages or compensation only to her, unless otherwise directed by her in writing.^{6*}

(110). An act of March 17, 1882,^{10*} authorizes "conditional sales" of rolling stock and other equipments to railroad companies under circumstances in which the title of the seller would not otherwise be supported against innocent purchasers from the vendee, but the transaction is to be recorded in a prescribed manner. An act of March 17, 1890, amends the former act, mainly in allowing the terms of payment to be extended over twenty-five years,^{10†} while the original act made ten years the utmost limit.

(122.) By an amendatory act of May, 1890, the attorney's lien for a fee as fixed by contract, or in the absence thereof, for a reasonable compensation, is extended to all claims, including those for unliquidated damages, the name of the attorney upon the record being sufficient notice.^{7*}

(128). When a pensioner receives his government check, the money is no longer "in course of transmission" within the meaning of Section 4747 of the Revised Statutes of the United States. If he indorses the check, and with it buys lands in his wife's name, such lands become liable for his debts.^{7*}

(129, *sub fine*). Under an act applying Section 8 of Chapter 44, Article II, of the General Statutes to the distribution of assets under a deed of trust for the benefit of creditors, claims must now be "verified in the mode required by law . . . against . . . deceased persons."¹¹ It is not clear how this act changes the former law.

(134). There are direct authorities.^{9*}

(146). The act of March 6, 1884, above referred to, is repealed, and by a new act it is made lawful for those "holding

^{6*}Sess. Acts, 1889-90, p. 23.

(110). ^{10*}B. and F. G. St., p. 18.

^{10†}Session Acts, 1889-'90, Ch. 304, p. 24.

(122). ^{7*}Session Acts, 1889-90, p. 128.

(128). ^{7*}Johnson v. Elkins, 11 Ky. L. R. 467. Of course an appeal lies

from this decision to the S. C. U. S.

(129). ¹¹Session Acts, 1889-'90, Ch. 580. Dobyys v. Dobyys' assignee, 79 Ky. 95, where the law for winding up assignments and Ch. 44, Art. II, are compared, throws but little light on the question.

(134). ^{9*}See Section 184, n. 6.

funds in a fiduciary capacity . . . to invest same in real estate mortgage notes or bonds, or such other interest-paying or dividend-paying securities as are regarded by prudent business men as safe investments, and to make loans with such securities as collateral; . . . such funds shall not be loaned on personal security alone, or be invested in the bonds of any railroad or other corporation, unless " it has been operated for over ten years and has not defaulted in that time, " or in the bonds of a county, town or city " that has defaulted within that time."¹*

(149, *sub fine*). An act framed on the model of similar laws in several Northern States forbids, under heavy penalties, the establishment of " pools, trusts, and conspiracies "; and corporations are not allowed to issue trust certificates. The corporation violating this law forfeits its charter, but only by being convicted under an indictment; and it may appeal from and supersede the sentence.¹⁰

(168). A written ratification of a verbal authority to sign a suretyship, is valid.²* The signature of one who is a surety in fact, though he is a co-obligor in form, and though the creditor be not notified of his suretyship, is void, if affixed without his written authority; but if the note bearing such signature is a renewal of a note signed by him in person, the obligation on the latter remains in force. There can be no merger in a void obligation.²**

(170). An amendment to the insurance acts, adopted in March, 1890, makes it one of the conditions on which a foreign insurance company may do business in the State, that it must, by " a written instrument, duly signed and sealed, " empower its agents to acknowledge service of process on its behalf, and consent to the service of process on any such agent. The license is to be withdrawn and not to be re-issued should the company remove an action brought against it from the State to the Federal court.¹*

NOTE.—As far as acts of the last session affect sections of this work later than the above, they have been embodied in the text.

(146). ²¹*Session Acts, '89-'90, Ch. 87 Ky. 597.
1076, p. 115.

²²* Riggan v. Crain, 86 Ky. 249.

(149). ¹⁰Session Acts, '89-'90, Ch. 1621, p. 148.

(170). ¹**Ibid.*, Ch. 378, p. 36. There are other provisions for the security

(168). ²* First Nat. Bank v. Gaines, of the policy holder in this act.

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